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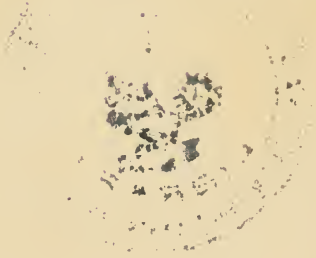

THE CODE

OF

CIVIL PROCEDURE

THE

CODE

OF

CIVIL PROCEDURE

OF THE

STATE OF CALIFORNIA.

ADOPTED MARCH 11, 1872, AND AMENDED UP TO AND INCLUDING 1897.

BY

JAMES H. DEERING,

Of the San Francisco Bar.

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AN ACT TO ESTABLISH A

CODE OF CIVIL PROCEDURE.

The People of the State of California, represented in Senate and Assembly, do enact as follows:

TITLE OF ACT.

§ 1. Title and division of this volume.

§ 1. This act shall be known as The Code of Civil Procedure of California, and is divided into four parts, as follows:

Part I. Of Courts of Justice.
II. Of Civil Actions.
III. Of Special Proceedings of a Civil Nature.
IV. Of Evidence.

This act, how cited: Sec. 19, post.

Construction of the codes and of their various sections: See Pol. Code, secs. 4478 et seq.

THE

CODE OF CIVIL PROCEDURE

OF CALIFORNIA.

PRELIMINARY PROVISIONS.

§ 2. When this Code takes effect.
§ 3. Not retroactive.
§ 4. Rule of construction of this Code.
§ 5. Provisions similar to existing laws, how construed.
§ 6. Tenure of office preserved.
§ 7. Construction of repeal as to certain officers.
§ 8. Actions, etc., not affected by this Code.
§ 9. Limitations shall continue to run.
§ 10. Holidays.
§ 11. Same.
§ 12. Computation of time.
§ 13. Certain acts not to be done on holidays.
§ 14. "Seal" defined.
§ 15. Joint authority.
§ 16. Words and phrases.
§ 17. Certain terms used in this Code defined.
§ 18. Statutes, etc., inconsistent with Code repealed.
§ 19. This act, how cited, enumerated.
§ 20. Judicial remedies defined.
§ 21. Division of judicial remedies.
§ 22. Action defined.
§ 23. Special proceeding defined.
§ 24. Division of actions.
§ 25. Civil actions arise out of obligations or injuries.
§ 26. Obligation defined.
§ 27. Division of injuries.
§ 28. Injuries to property.
§ 29. Injuries to the person.
§ 30. Civil action, by whom prosecuted.
§ 31. Criminal actions.
§ 32. Civil and criminal remedies not merged.

§ 2. This Code takes effect at twelve o'clock noon, on the first day of January, eighteen hundred and seventy-three.

See secs. 8, 18.

Effect of codes generally: See Polit. Code, secs. 4478 et seq.

§ 3. No part of it is retroactive, unless expressly so declared.

See sec. 18.

Impairing vested rights: See sec. 8, post.

§ 4. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.

Construction of codes with relation to each other, and reconciling conflicts between titles, chapters, and articles: See Polit. Code, secs. 4478 et seq.

Construction of statutes: See secs. 1858, 1859.

Liberal interpretation: See secs. 452, 475.

§ 5. The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments.

See sec. 18.

§ 6. All persons who at the time this Code takes effect hold office under any of the acts repealed continue to hold the same according to the tenure thereof, except those offices which are not continued by one of the codes adopted at this session of the Legislature.

See next section.

§ 7. When any office is abolished by the repeal of any act, and such act is not in substance re-

enacted or continued in either of the Codes, such office ceases at the time the Codes take effect.

Repeals by implication: See sec. 18, post.

§ 8. No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein must conform to the requirements of this Code as far as applicable.

See Civil Code, secs. 6, 20; also repealing clause at the end of this Code.

§ 9. When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code. [Amendment approved March 30, 1874; Amendments 1873-4, 1. In effect July 1st, 1874.]

See secs. 361, 362.

Limitation of actions: See post, secs. 312 et seq.

§ 10. Holidays within the meaning of this Code are every Sunday, the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the ninth day of September, the first Monday in September, the twenty-fifth day of December, every day on which an election is held throughout the State, and every day appointed by the President of the United States, or by the Governor of this State, for a public fast, thanksgiving, or holiday. If the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the ninth day of September, or the twenty-fifth day of December fall upon a Sunday, the Monday

following is a holiday. [Approved February 23, Stats. 1897, ch. XIX. In effect immediately.]

Also amended in 1889, Stats. 1889, 46, and 1893, Stats. 1893, 186.

Nonjudicial days: See post, 134.

§ 11. If the first day of January, the twenty-second day of February, the fourth day of July, or the twenty-fifth day of December, falls upon a Sunday, the Monday following is a holiday. [Amendment approved March 24, 1874; Amendments 1873-4, 279. In effect July 1st, 1874.]

Holidays, when counted: See sec. 13.

§ 12. The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.

Time to amend: See sec. 476.

Time, how computed, and year, week, and day defined: Polit. Code, secs. 3255 et seq.

§ 13. Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed.

§ 14. When the seal of a court, public officer, or person, is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto.

Seals: See secs. 147 to 153, and 1929 to 1934.

Seals other than official are abolished by the Civil Code, sec. 1629.

Court seals: See secs. 147 et seq., post.
Seals for private writings: See sec. 1929, post.

§ 15. Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.

§ 16. Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition.

§ 17. Words used in this Code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word "person" includes a corporation as well as a natural person; writing includes printing; oath includes affirmation or declaration; and every mode of oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose"; signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness.

The following words also have in this Code the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "property" includes both real and personal property.

2. The words "real property" are coextensive with lands, tenements, and hereditaments.

3. The words "personal property" include money, goods, chattels, things in action, and evidences of debt.

4. The word "month" means a calendar month, unless otherwise expressed.

5. The word "will" includes codicils.

6. The word "writ" signifies an order or precept in writing, issued in the name of the people, or of a court or judicial officer, and the word "process" a writ or summons issued in the course of judicial proceedings.

7. The word "State," when applied to the different parts of the United States, includes the District of Columbia and the territories; and the words "United States" may include the district and territories. [Amendment, approved March 24, 1874; Amendments 1873-4, 280. In effect July 1, 1874.]

Words used in boundaries are defined in sections 3903 to 3907 of the Political Code.

§ 18. No statute, law, or rule is continued in force, because it is consistent with the provisions of this code on the same subject; but in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this State, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated.

This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this Code provided; nor does it affect any private statute not expressly repealed.

See secs. 3, 8; also repealing clause at the end of this Code.

Limitations. See sec. 9.

Retroactive effect. See sec. 3.

Statutes continued in force. See Polit. Code, sec. 19.

Vested rights. See sec. 8.

§ 19. This act, whenever cited, enumerated, referred to, or amended, may be designated simply as the "Code of Civil Procedure," adding, when necessary, the number of the section.

§ 20. Judicial remedies are such as are administered by the courts of justice, or by judicial officers empowered for that purpose by the constitution and statutes of this State.

§ 21. These remedies are divided into two classes:

1. Actions; and,
2. Special proceedings.

§ 22. An action is an ordinary proceeding in a court of justice, by which one party prosecutes another, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

§ 23. Every other remedy is a special proceeding.

See secs. 52, 75, 1022, 1063, 1064, 1109, 1110, and Part III of this Code, generally.

Special proceedings of a civil nature: See post, part 3, secs. 1067 et seq.

§ 24. Actions are of two kinds:

1. Civil; and,
2. Criminal.

Civil action, form of: See sec. 307, post.

Criminal action: See infra, sec. 31.

§ 25. A civil action arises out of:

1. An obligation;
2. An injury.

§ 26. An obligation is a legal duty, by which one person is bound to do or not to do a certain thing, and arises from:

1. Contract; or,

2. Operation of law. [Amendment, approved March 24, 1874; Amendments 1873-4, 281. In effect July 1, 1874.]

Obligation, what. See Civil Code, sec. 1427, 1428.

§ 27. An injury is of two kinds:

1. To the person; and,

2. To property.

§ 28. An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating or destroying it.

§ 29. Every other injury is an injury to the person.

§ 30. A civil action is prosecuted by one party against another for the enforcement or protection of a right, or the redress or prevention of a wrong.

Forms of action. See post, sec. 307, et seq.

§ 31. The Penal Code defines and provides for the prosecution of a criminal action.

Criminal action defined: See Pen. Code, § 683.

§ 32. When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

PART I.

OF COURTS OF JUSTICE.

TITLE I.

ORGANIZATION AND JURISDICTION.

Chap. I. Courts of Justice in General, §§ 33, 34.
II. Court of Impeachment, §§ 36-39.
III. Supreme Court, §§ 40-56.
IV. Superior Court, §§ 65-79.
V. Justices' Courts, §§ 85-115.
VI. Police Courts, § 121.
VII. General Provisions Respecting Courts of Justice, §§ 124-153.

[Part I, §§ 33-304, amended and in effect April 1, 1880. Amendments 1880, 21.]

CHAPTER I.

COURTS OF JUSTICE IN GENERAL.

§ 33. The several courts of this State.
§ 34. Courts of record.

§ 33. The following are the Courts of Justice of this State:

1. The Court of Impeachment;
2. The Supreme Court;
3. The Superior Courts;
4. The Justices' Courts;
5. The Police Courts and such other inferior courts as the Legislature may establish in any incorporated city or town, or city and county.

See Const. Cal., arts. 3, 6.

For subd. 5, see Const. Cal. art. 6, sec. 13.

Jurisdiction of the above courts is considered, post, in the various chapters treating thereof.

Court of impeachment: See post, secs. 36 et seq.

Supreme Court: See post, secs. 40 et seq.

Superior courts: See post, secs. 65 et seq.

Justices' courts: See post, secs. 85 et seq.

Police courts: Sec. 121.

§ 34. The courts enumerated in the first three subdivisions of the last preceding section are courts of record.

Const. Cal. art. 6, secs. 12, 22.

CHAPTER II.

COURT OF IMPEACHMENT.

§ 36. Members of the court.
§ 37. Jurisdiction.
§ 38. Officers of the court.
§ 39. Trial of impeachments provided for in the Penal Code.

§ 36. The Court of Impeachment is the Senate; when sitting as such court, the senators shall be upon oath; and at least two-thirds of the members elected shall be necessary to constitute a quorum.

Const. Cal., art. 6, secs. 12, 22.

§ 37. The court has jurisdiction to try impeachments, when presented by the Assembly, of the Governor, Lieutenant-Governor, Secretary of State, Controller, Treasurer, Attorney-General, Surveyor-General, Chief Justice of the Supreme Court, Associate Justices of the Supreme Court, and Judges of the Superior Courts for any misdemeanor in office.

Const. Cal. art. 4, sec. 18.

§ 38. The officers of the Senate are the officers of the court.

See Penal Code, secs. 10, and 737 to 753.

§ 39. Proceedings on the trial of impeachments are provided for in the Penal Code.

Proceedings for removal. See Penal Code, sec. 737 et seq.

CHAPTER III.

SUPREME COURT.

§ 40. Justices, elections, and terms of office.
§ 41. Computation of years of office.
§ 42. Vacancies.
§ 43. Departments.
§ 44. Apportionment of business.
§ 45. Court in bank.
§ 46. Absence or disability of Chief Justice.
§ 47. Sessions.
§ 48. Adjournments.
§ 49. Decisions in writing.
§ 50. Jurisdiction of two kinds.
§ 51. Original jurisdiction.
§ 52. Appellate jurisdiction.
§ 53. Powers in appealed cases.
§ 54. Concurrence necessary to transact business.
§ 55. Transfer of books, papers, and actions.
§ 56. Remittiturs in transferred cases.
§ 57. Appeals in probate proceedings.

§ 40. The Supreme Court shall consist of a Chief Justice and six Associate Justices, who shall be elected by the qualified electors of the State at large, at the general state elections next preceding the expiration of the terms of office of their predecessors respectively, and hold their offices for the term of twelve years from and after the first Monday after the first day of January next succeeding their election; provided, that of the justices elected at the general State election of eighteen hundred and seventy-nine, the Chief Justice shall go

out of office at the end of eleven years and the six Associate Justices shall have so classified, or shall so classify themselves, by lot, that two of them shall go out of office at the end of three years, two of them at the end of seven years, and two of them at the end of eleven years, from the first Monday after the first day of January, eighteen hundred and eighty; and an entry of such classification shall have been or shall be made in the minutes of the court in bank, signed by them, and a duplicate thereof filed in the office of the Secretary of State.

Const. Cal. art. 6, secs. 2, 3.

Eligibility. Sec. 156.

Jurisdiction of Supreme Court: See post, secs. 50-53.

Vacancy in the court: See secs. 42, 46.

Acts relating to Supreme Court commission. See post, Appendix, 790, et seq.

§ 41. The years during which a justice of the Supreme Court is to hold office are to be computed respectively from and including the first Monday after the first day of January of any one year to and excluding the first Monday after the first day of January of the next succeeding year.

Const. Cal. art. 6, sec. 3.

§ 42. If a vacancy occur in the office of a Justice of the Supreme Court, the Governor shall appoint an eligible person to hold the office until the election and qualification of a justice to fill the vacancy, which election shall take place at the next succeeding general election; and the justice so elected shall hold the office for the remainder of the unexpired term of his predecessor.

Const. Cal. art. 6, sec. 3.

Vacancy: See the subject generally, Pol. Code, secs. 995 et seq.

Absence of chief justice: See infra, sec. 46.

Vacancy in office of judge does not affect pending proceedings: See post, sec. 184.

§ 43. There shall be two departments of the Supreme Court, denominated respectively Department One and Department Two. The Chief Justice shall assign three of the Associate Justices to each department, and such assignment may be changed by him from time to time; provided, that the Associate Justices shall be competent to sit in either department, and may interchange with one another by agreement among themselves, or if no such agreement be made, as ordered by the Chief Justice. The Chief Justice may sit in either department, and shall preside when so sitting; but the justices assigned to each department shall select one of their number as presiding justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions in relation to the court in bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers; but one or more of the justices may adjourn from time to time with the same effect as if all were present, and the concurrence of three justices shall be necessary to pronounce a judgment; provided, that if three do not concur, the cause may be reheard in the same department, or transmitted to the other department, or to the court in bank.

Const. Cal. art. 6, sec. 2.

Chambers, powers at. Sec. 165, post.

Adjournment, holidays. Secs. 134 and 135, post.

§ 44. The Chief Justice shall apportion the business to the departments, and may, in his discre-

tion, order any cause pending before the court to be heard and decided by the court in bank. The order may be made before or after judgment pronounced by a department; but when a cause has been allotted to one of the departments and a judgment pronounced therein, the order must be made within thirty days after such judgment, and concurred in by two Associate Justices; and if so made, it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a cause to be heard in bank. If the order be not made within the time above limited, the judgment shall be final; provided that no judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the Chief Justice in writing, with the concurrence of two Associate Justices.

Const. Cal., art. 6, sec. 2. See sec. 129; Supreme Ct. rule 30.

§ 45. The Chief Justice or any four justices may convene the court in bank at any time, and the Chief Justice shall be the presiding justice of the court when so convened. The presence of four justices shall be necessary to transact any business, and the concurrence of four justices present at the argument shall be necessary to pronounce a judgment in the court in bank; provided, that if four justices so present do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument, but to render a judgment a concurrence of four justices shall be necessary; and every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in one of the departments, and in such cases the judgment of the court in bank shall be final, unless

within thirty days after such judgment an order be made in writing, signed by four justices, granting a rehearing.

Const. Cal. art. 6, sec. 2.

§ 46. In case of the absence of the Chief Justice from the place at which the court in bank is held, or his inability to act, the Associate Justices shall select one of their own number to perform the duties and exercise the powers of the Chief Justice during such absence or inability to act.

Const. Cal. art. 6, sec. 2.

§ 47. The Supreme Court shall always be open for the transaction of business. It shall hold regular sessions for the hearing of causes, either in bank, or in one or both of its departments, at the capital of the State, commencing on the first Mondays of May and second Mondays of November; at the city and county of San Francisco, commencing on the second Mondays of January and third Mondays of July; and at the city of Los Angeles, commencing on the first Mondays of April and second Mondays of October; and special sessions at either of the above-named places at such other times as may be prescribed by the justices thereof. The justices and officers of the Supreme Court shall be allowed their actual traveling expenses in going to and from their respective places of residence upon the business of the court, or to attend its sessions. If proper rooms in which to hold the court, and for the accommodation of the officers thereof, are not provided by the State, together with attendants, furniture, fuel, lights, and stationery, suitable and sufficient for the transaction of business, the court, or any three justices thereof, may direct the clerk of the Supreme Court to provide such rooms, attendants, furniture, fuel,

lights, and stationery; and the expenses thereof, certified by any three justices to be correct, shall be paid out of the State treasury, for which expenses, and to defray the traveling expenses of the justices and officers of the Supreme Court above mentioned, a sufficient sum shall be annually appropriated out of any funds in the State treasury not otherwise appropriated. The moneys so appropriated shall be subject to the order of the Clerk of the Supreme Court, and be by him disbursed on proper vouchers, and the same shall be accounted for by him in annual settlements with the Controller of State on the first Monday of December of each year.

Always open. Const. Cal. art. 6, sec. 2, and sec. 134, post.

§ 48. Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court, or either of its departments, from sitting at any time.

Const. Cal. art. 6, sec. 2.

Terms of Court. This section, with section 74, post, does away with the terms of courts, and renders it unnecessary to collate the decisions upon questions connected with that subject. See also section 74, post, as to superior courts, and sections 88 and 104 as to justices' courts.

§ 49. In the determination of causes, all decisions of the Supreme Court in bank, or in departments, shall be given in writing, and the grounds of the decision shall be stated.

Const. Cal. art. 6, sec. 2.

§ 50. The jurisdiction of the Supreme Court is of two kinds:

1. Original; and,

2. Appellate.

See subsequent sections of this chapter.

§ 51. In the exercise of its original jurisdiction the Supreme Court shall have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus; and it shall also have power to issue all other writs necessary and proper to the complete exercise of its appellate jurisdiction.

Const. Cal. art. 6, sec. 4.

Mandamus. Secs. 54, 76, 165, 1084 et seq., 1108 to 1110.

Certiorari. Secs. 54, 76, 165, 1067 et seq., 1108 to 1110.

Prohibition. Secs. 54, 76, 165, 1102 et seq., 1108 to 1110.

Habeas Corpus. Secs. 54, 76, 165; generally, Pen. Code, sec. 1473, et seq.

Injunction. Secs. 54, 76, 165, 356, 525 et seq., 745, 1341.

Procedendo. Sec. 129, Supreme Ct. rule.

Writs, certain, abolished—scire facias and quo warranto, sec. 802 (but as to latter, see sec. 76, subd. 5).

Writ. Defined, sec. 17; seal, sec. 153; issuance, sec. 54; service by telegraph, sec. 1017.

Powers of single justice to issue writs: See post, sec. 54.

Ne exeat: See post, secs. 478 et seq.

§ 52. The Supreme Court shall have appellate jurisdiction:

1. In all cases in equity, except such as arise in Justices' Courts;

2. In all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine, or in which the demand, exclusive of interest, or the

value of the property in controversy, amounts to three hundred dollars;

3. In all cases of forcible entry and detainer, proceedings in insolvency, actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law;

4. In all special proceedings;

5. In all criminal cases prosecuted by indictment or information, in a court of record, on questions of law alone.

Const. Cal. art. 6, sec. 4.

Appeals in general. Sec. 936 et seq.

Appeals to Supreme Court. Sec. 963 et seq.

Proceedings in insolvency: See sec. 1822; and the act of 1895 in Appendix, post, p. 817.

Nuisance: See post, sec. 731.

Probate matters: See sec. 963, subd. 3.

Forcible entry and detainer: See post, secs. 1180 et seq.

Mandamus, etc. The supreme court has appellate jurisdiction in cases of mandamus and prohibition: See post, sec. 1063.

Act transferring business, records, etc., of court under old constitution. See post, Appendix, p. 865.

§ 53. The Supreme Court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. The decision of the court shall be given in writing; and in giving its decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. Its judgment in appealed cases shall be remitted to the court from which the appeal was taken.

Death, suggestion of: Sec. 385.

Ejectment. Termination of plaintiff's right pending action: Sec. 740.

Marriage, suggestion of: Sec. 385.

Errors and defects are to be disregarded: Sec. 475.

Records, though not conclusive, are presumed correctly to determine the rights of the parties: Sec. 1963, subd. 17.

As to costs on modification: Sec. 1027.

Remittitur: Sec. 958.

Repeated applications for same order, etc.: See secs. 182, 183.

Res adjudicata: Sec. 1908.

§ 54. The concurrence of three Justices of the Supreme Court is necessary for the issuance of any writ, or the transaction of any business, except such as can be done at chambers; provided, that each of the justices shall have power to issue writs of habeas corpus to any part of the State upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court, or any department, or judge thereof, or before any Superior Court in the State or any judge thereof.

See Const. Cal., art. 6, sec. 4.

Business at chambers—sec. 165.

Habeas Corpus.—See U. S. Const., art. 8, Amdts., and Const. Cal., art. 2, secs. 5, 6.

Generally—Penal Code, sec. 1473 et seq., sec. 1492 et seq., 1268, et seq.

§ 55. All records, books, papers, causes, actions, proceedings, and appeals lodged, deposited, or pending in the Supreme Court abolished by the constitution, are transferred to the Supreme Court herein provided for, which has the same power and jurisdiction over them as if they had been in the first instance lodged, deposited, filed, or

commenced therein, or, in cases of appeal, appealed thereto.

Const. Cal., art. 22, sec. 3.

§ 56. In all cases of appeal transferred to the Supreme Court, its judgments shall be remitted to the Superior Courts of the counties, or cities and counties, from which the appeals were taken respectively, with the same force and effect as if said cases had been appealed to the Supreme Court from such Superior Courts.

Transfer of records.—As to transfer of records, books, papers, and business from old court to new, see appendix, p. 865; also post, sec. 79.

§ 57. Appeals in probate proceedings shall be given preference in hearing in the Supreme Court, and be placed on the calendar in the order of their date of issue, next after cases in which the people of the State are parties. [New section approved March 10, 1887; Stats. 1887, p. 82.]

CHAPTER IV.

SUPERIOR COURTS.

§ 65. Judges and elections.
§ 66. Superior Courts of two or more judges.
§ 67. Superior Court of the City and County of San Francisco.
§ 68. Terms of office.
§ 69. Computation of years of office.
§ 70. Vacancies.
§ 71. Superior Courts by judges of other counties.
§ 72. Judges pro tempore.
§ 73. Sessions.
§ 74. Adjournments.
§ 75. Jurisdiction of two kinds.
§ 76. Original jurisdiction.
§ 77. Appellate jurisdiction.
§ 78. Process.
§ 79. Transfer of books, papers, and actions.

§ 65. There shall be in each of the organized counties, or cities and counties of the State, a Superior Court, for each of which one judge, and for some of which two or more judges, as hereinafter in subsequent sections specially provided, shall be elected by the qualified electors of the county, or city and county, at the general State elections next preceding the expiration of the terms of office of their predecessors respectively; provided, that in and for the counties of Yuba and Sutter combined, only one Superior Judge shall be elected, who shall hold the Superior Courts of both said counties, and in accordance with such rules for the dispatch of business in both said counties as he may adopt.

Const. Cal., art. 6, sec. 6.

Jurisdiction of Superior Courts: See post, secs. 75-78.

Acts increasing and reducing number of judges in various counties: See post, Appendix, pp. 801, et seq.

§ 66. In each of the counties of Alameda, Los Angeles, Sacramento, San Joaquin, Santa Clara, and Sonoma, there shall be elected two judges of the Superior Court; and in each of said counties, and in any county, or city and county, other than the city and county of San Francisco, in which there shall be more than one judge of the Superior Court, the judges of such court may hold as many sessions of said court at the same time as there are judges thereof, and shall apportion the business among themselves as equally as may be.

Const. Cal., art. 6, secs. 6, 7.

Acts increasing and reducing number of judges in various counties: See post, Appendix, pp. 801, et seq.

§ 67. In the city and county of San Francisco there shall be elected twelve judges of the Superior Court, any one or more of whom may hold court; and there may be as many sessions of said court at the same time as there are judges thereof. The said judges shall choose from their own number a presiding judge, who may at any time be removed and another chosen in his place, by a vote of any seven of them. The presiding judge shall distribute the business of the court among the judges thereof, and prescribe the order of business. The judgments, orders, and proceedings of any session of the Superior Court, held by any one or more of the judges of said court, shall be equally effective as if all the judges of said court presided at such session.

Const. Cal., art. 6, sec. 6.

Process—sec. 78.

Act allowing superior judges of San Francisco to appoint secretary: See post, Appendix, p. 800.

§ 68. The term of office of judges of the Su-

perior Court shall be six years from and after the first Monday of January next succeeding their election; provided, that the twelve judges of the Superior Court elected in the city and county of San Francisco at the general State election of eighteen hundred and seventy-nine shall have so classified, or shall so classify themselves, by lot, that four of them shall go out of office at the end of one year, four of them at the end of three years, and four of them at the end of five years from the first Monday of January, eighteen hundred and eighty; and the entry of such classification shall have been, or shall be, made in the minutes of the court, signed by them, and a duplicate thereof filed in the office of the secretary of State; and provided further, that all the other superior Judges elected at the general State election of eighteen hundred and seventy-nine shall go out of office at the end of five years from the first Monday of January, eighteen hundred and eighty.

Const. Cal., art. 6, sec. 6.

§ 69. The years during which a judge of a Superior Court is to hold office are to be computed respectively from and including the first Monday of January of any one year to and excluding the first Monday of January of the next succeeding year.

Const. Cal., art. 6, sec. 6. See sec. 41, ante.

§ 70. If a vacancy occur in the office of judge of a Superior Court, the governor shall appoint an eligible person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Const. Cal., art. 6, sec. 6. See sec. 42, ante.

Vacancies in office, and the mode of supplying them: See Polit. Code, secs. 995 et seq.

Vacancy does not affect pending proceedings: See post, sec. 184.

§ 71. A judge of any Superior Court may hold the Superior Court in any county, at the request of the judge or judges of the Superior Court thereof, and upon the request of the governor, it shall be his duty to do so; and in either case the judge holding the court shall have the same power as a judge thereof.

Const. Cal., art. 6, sec. 8. See post, sec. 160.

§ 72. Any cause in a Superior Court may be tried by a judge pro tempore, who must be a member of the bar admitted to practice before the Supreme Court, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the cause; and his action in the trial of such cause shall have the same effect as if he were a judge of such court. A judge pro tempore shall, before entering upon his duties in any cause, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States and the constitution of the State of California, and that I will faithfully discharge the duties of the office of judge pro tempore in the cause wherein —— is plaintiff, and —— is defendant, according to the best of my ability."

Const. Cal., art. 6, sec. 8.

Must be admitted before Supreme Court: See post, sec. 157.

§ 73. The Superior Courts shall be always open (legal holidays and nonjudicial days ex-

cepted) and they shall hold their sessions at the county seats of the several counties, or cities and counties, respectively. They shall hold regular sessions, commencing on the first Mondays of January, April, July, and October, and special sessions at such other times as may be prescribed by the judge or judges thereof; provided, that in the city and county of San Francisco the presiding judge shall prescribe the times of holding such special sessions.

See Const. Cal., art. 6, sec. 5.

Always open—see same.

Holidays, etc.—See ante, sec. 10, post; secs. 134, 135.

Adjournments from time to time mere recesses in the sessions: See sec. 74, infra; see, also, sec. 48, ante.

§ 74. Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time.

See sec. 48, and sec. 104.

§ 75. The jurisdiction of the Superior Courts is of two kinds:

1. Original; and,
2. Appellate.

See secs. 33, and 50.

§ 76. The Superior Courts shall have original jurisdiction:

1. In all cases in equity;
2. In all civil actions in which the subject of litigation is not capable of pecuniary estimation;
3. In all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine,

and in all other cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars;

4. Of actions of forcible entry and detainer, of proceedings in insolvency, of actions to prevent or abate a nuisance, of all matters of probate, of divorce, and for annulment of marriage, and of all such special cases and proceedings as are not otherwise provided for;

5. In all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for. Said courts shall have the power of naturalization, and to issue papers therefor. Said courts and their judges, or any of them, shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and of habeas corpus on petition by or on behalf of any person in actual custody, in their respective counties. Injunctions and writs of prohibition may be issued and served on legal holidays and nonjudicial days.

Const. Cal., art. 6, sec. 5.

Venue of actions: Sec. 392, post.

Nuisance: Secs. 57, 731.

Insolvency: See sec. 1822, and the act of 1895 in Appendix, p. 817.

Act conferring upon Superior Judges powers of probate, district and county judges: See post, Appendix, p. 799.

§ 77. The Superior Courts shall have appellate jurisdiction in such cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law.

Const. Cal., art. 6, sec. 5.

Appeals to Superior Courts: See post, secs. 974-980.

§ 78. The process of the Superior Courts shall extend to all parts of the State; provided, that all

actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated.

Const. Cal., art. 6, sec. 5.

Real property—Commencing action; as to place of trial, see secs. 392, 396.

§ 79. All records, books, papers, causes, actions, proceedings, and appeals lodged, deposited, or pending in the District Court or Courts, County Court, Probate Court, Municipal Criminal Court, or Municipal Court of Appeals, of, in, or for any county, or city and county, of the State, abolished by the constitution, are transferred to the Superior Court of such county, or city and county, which has the same power and jurisdiction over them as if they had been in the first instance lodged, deposited, filed, or commenced therein, or, in cases of appeal, appealed thereto.

Const. Cal., art. 22, sec. 3.

Transfer of books, papers, and actions: See ante, sec. 55; see sec. 76, ante.

Act conferring upon Superior Court, powers of district, county, and probate courts: See post, Appendix, p. 799.

Act transferring to Superior Court business, records, etc., of courts in existence under old constitution: See post, Appendix, p. 799.

CHAPTER V.

JUSTICES' COURTS.

Article I. Of Justices' Courts in Cities and Counties.
II. Of Justices' Courts in Townships.
III. Justices of the Peace and Justices' Courts in General.

ARTICLE I.

JUSTICES' COURTS IN CITIES AND COUNTIES.

§ 85. Justices' Court and justices.
§ 86. Justices' Clerk.
§ 87. Sheriff and deputies.
§ 88. Offices and office hours.
§ 89. Actions.
§ 90. Reassignment and transfer of actions.
§ 91. Payment of fees.
§ 92. Certificates, transcripts, and others papers.
§ 93. Justices' docket.
§ 94. Territorial extent of jurisdiction.
§ 95. Practice and rules.
§ 96. Attorneys.
§ 97. Salaries.
§ 98. What justices successors of others.

§ 85. There shall be in every city and county of more than one hundred thousand population a justices' court, for which five justices of the peace shall be elected by the qualified electors of such city and county, at the general State election next preceding the expiration of the terms of office of their predecessors. Any one of said justices may hold court, and there may be as many sessions of said court at the same time as there are justices thereof. The said justices shall choose one of their number to be presiding justice, who may at any time be removed and another appointed in his place by a vote of a majority of them; provided, that in case of the temporary absence or disability

of the presiding justice, any one of the other justices, to be designated by the presiding justice, may act as presiding justice during such absence or disability.

Const. Cal., art. 6, sec. 11.

Compare throughout this article, Consolidation Act, containing act of March 26th, 1866, organizing San Francisco Justices' Court, with amendments thereto.

Justices' courts.—Elections of justices, compare secs. 103, 110.

Act providing that mayor of certain cities shall not act as justice: See post, Appendix, p. 798.

§ 86. The supervisors of such city and county shall appoint a justice's clerk, on the written nomination and recommendation of said justices, or a majority of them, who shall hold office for two years, and until his successor is in like manner appointed and qualified. Said justices' clerk shall take the constitutional oath of office, and give bond in the sum of ten thousand dollars for the faithful discharge of the duties of his office, and in the same manner as is or may be required of other officers of such city and county. A new or additional bond may be required by the supervisors of such city and county, and in such amount as may be fixed by said supervisors, whenever they may deem it necessary. The justices' clerk shall have authority to appoint two deputy clerks, for whose acts he shall be responsible on his official bond, the said deputy clerks to hold office during the pleasure of said clerk. Said justices' clerk and deputy shall have authority to administer oaths, and take and certify affidavits in any action, suit, or proceeding in said justices' court.

Clerks generally: See sec. 262.

§ 87. The sheriff of such city and county shall be ex officio an officer of said court, and it shall be his duty to serve or execute, or cause to be served and executed, each and every process, writ, or order that may be issued by said justices' court; provided, that a summons issued from said court may be served and returned as provided in section eight hundred and forty-nine of this Code; and that subpoenas may be issued by the justices' clerk, and served as provided in section one thousand nine hundred and eighty-seven and one thousand nine hundred and eighty-eight of this Code. The said sheriff may appoint, in addition to the other deputies allowed by law, three deputies, whose duty it shall be to assist said sheriff in serving and executing the process, writs, and orders of the said justices' court. Said deputies shall receive a salary of one hundred and twenty-five dollars per month each, payable monthly out of the city and county treasury, and out of the special fee fund, after being first allowed and audited as other demands are by law required to be audited and allowed. One of said deputies shall remain in attendance during the sessions of said court, and at such other times as the said court or the presiding justice thereof may order and direct, for the purpose of attending to such duties as may be imposed on said sheriff or said deputies, as herein provided, or required by law. The said sheriff shall be liable on his official bond for the faithful performance of all duties required of him or any of his said deputies.

Sheriff generally: See sec. 262.

§ 88. The supervisors of such city and county shall provide, in some convenient locality in the city and county, a suitable office or suite of offices for said presiding justice, justices' clerk, deputy

clerk, and deputy sheriff, and offices suitable for holding sessions of said court, and separate from one another, for each of said justices of the peace, together with attendants, furniture, fuel, lights, and stationery sufficient for the transaction of business; and if they are not provided, the court may direct the sheriff to provide the same, and the expenses incurred, certified by the justices to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof. The said justices, justices' clerk, and deputy clerk shall be in attendance at their respective offices, for the dispatch of official business daily, from the hour of eight o'clock a. m. until five o'clock p. m.

§ 89. All actions, suits, and proceedings in such city and county whereof justices of the peace or justices' courts have jurisdiction, except those cases of concurrent jurisdiction that may be commenced in some other court, shall be entitled, "In the Justices' Court of the City and County of ——" (inserting the name of the city and county) and commenced and prosecuted in said justices' court, which shall be always open. The original process shall be returnable, and the parties summoned required to appear before the presiding justice, or before one of the other justices of the peace, to be designated by the presiding justice, at his office; but all complaints, answers, and other pleadings and papers required to be filed, shall be filed, and a record of all such actions, suits, and proceedings made and kept in the clerk's office aforesaid; and the presiding justice and each of the other justices shall have power, jurisdiction, and authority to hear, try, and determine any action, suit, or proceeding so commenced, and which shall have been made returnable before him, or may be assigned or transferred to him, or any motion, appli-

cation, or issue therein (subject to the constitutional right of trial by jury), and to make any necessary and proper orders therein.

Concurrent jurisdiction: See sec. 113, post.

Jurisdiction of justices' court: See post, secs. 112 et seq.

§ 90. In case of sickness or disability or absence of a justice of the peace (on the return of a summons or at the time appointed for trial) to whom a cause has been assigned, the presiding justice shall reassign the cause to some other justice, who shall proceed with the trial and disposition of said cause in the same manner as if originally assigned to him; and if, at any time before the trial of a cause or matter returnable or pending before any of said justices, either party shall object to having the cause or matter tried before such justice, on the ground that such justice is a material witness for either party, or on the ground of the interest, prejudice, or bias of such justice, and such objection be made to appear in the manner prescribed by section eight hundred and thirty-three of this Code, the said justice shall suspend proceedings, and the presiding justice, on motion and production before him of the affidavit and proofs, shall order the transfer of the cause or matter for trial before some other justice, to be designated by him. The presiding justice may, in like manner, assign or transfer any contested motion, application, or issue in law, arising in any cause returnable or pending before him or any other justice, to some other justice; and the said justice, to whom any cause, matter, motion, application, or issue shall be so as aforesaid assigned or transferred, shall have power, jurisdiction, and authority to hear, try, and determine the same accordingly.

§ 91. All legal process of every kind in actions, suits or proceedings in said justices' court, for the issue or service of which any fee is or may be allowed by law, shall be issued by the said justices' clerk upon the order of the presiding justice, or upon the order of one of the justices of the peace, acting as presiding justice, as in this article provided; and the fees for issuance and service of all such process, and all other fees which are allowed by law for any official services of justices, justices' clerks, or sheriff, shall be exacted and paid in advance into the hands of said clerk, and be by him daily, or weekly, or monthly, as the supervisors may require, and before his salary shall be allowed, accounted for in detail, under oath, and paid into the treasury of such city and county as part of the special fee fund thereof; provided, that such payment in advance shall not be exacted from parties who may prove to the satisfaction of the presiding justice that they have a good cause of action, and that they are not of sufficient pecuniary ability to pay the legal fees; and no judgment shall be rendered in any action before said justices' court, or any of said justices, until the fees allowed therefor, and all fees for previous services therein, which are destined to be paid into the treasury, shall have been paid, except in cases of poor persons, as hereinbefore provided.

Const. Cal., art. 6, sec. 15.

§ 92. Cases which by the provisions of law are required to be certified ta the Superior Court, by reason of involving the question of title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, shall be so certified by the presiding justice and justices' clerk; and for that purpose, if such question

shall arise on the trial, while the case is pending before one of the other justices, such justice shall certify the same to the presiding justice. All abstracts and transcripts of judgments and proceedings in said court, or in any of the dockets or registers of or deposited in said court, shall be given and certified from any of such dockets or registers, and signed by the presiding justice and clerk, and shall have the same force and effect as abstracts and transcripts of justices of the peace in other cases. Appeals from judgments rendered in said court shall be taken and perfected in the manner prescribed by law; but the notice of appeal, and all the papers required to be filed to perfect it, shall be filed with the justices' clerk. Statements on appeal shall be settled by the justice who tried the cause. Sureties on appeal, or on any bond, or undertaking given in any cause or proceeding in said court, when required to justify, may justify before any one of the justices.

Transfer—to Superior Court, see sec. 838.
Appeals: See sec. 974, et seq.

§ 93. In a suitable book, strongly bound, the justices' clerk shall keep a permanent record of all actions, proceedings, and judgments commenced, had, or rendered in said justices' court, which book shall be a public record, and be known as the "Justices' Docket," in which docket the clerk shall make the same entries as are provided for in section nine hundred and eleven of this Code, and which said docket and entries therein shall have the same force and effect as is provided by law in reference to dockets of justices of the peace. To enable the clerk to make up such docket, each of the justices shall keep minutes of his proceedings in every cause returnable before or assigned or transferred to him for trial or hearing; and upon

judgment or other disposition of a cause, such justice shall immediately certify and return the said minutes, together with all pleadings and papers in said cause, to the clerk's office, who shall immediately thereupon file the same and make the proper entries under the title of the action in the docket aforesaid.

Docket generally: Sec. 911 et seq.; effect of, sec. 912.

§ 94. The jurisdiction of the justices' court of such city and county extends to the limits of the city and county, and its process may be served in any part thereof.

Jurisdiction: Secs. 112 et seq.; 925, post.

§ 95. The justices' court and the justices of the peace of every such city and county shall be governed in their proceedings by the provisions of law regulating proceedings before justices of the peace, so far as such provisions are not altered or modified in this article, and the same are or can be made applicable in the several cases arising before them. The justices' courts of such city and county shall have power to make rules not inconsistent with the constitution and laws for the government of such justices' court and the officers thereof; but such rules shall not be in force until thirty days after their publication; and no rules shall be made imposing any tax or charge on any legal proceeding, or giving any allowance to any justice or officer for services.

Provisions applicable: See post, secs. 832-925.

Rules of courts generally: See post, sec. 129.

§ 96. It shall not be lawful for any justice of the peace, justices' clerk, or sheriff of any such

city and county, or any of their deputies, to appear or advocate, or in any manner act as attorney, counsel, or agent for any party or person in any cause, or in relation to any demand, account, or claim pending, or to be sued or prosecuted before said court or justices, or either of them; nor shall any person other than an attorney at law, duly admitted to practice in courts of record, be permitted to appear as attorney or agent for any party in any cause or proceeding before said justice's court, or any of said justices, unless he produce a sufficient power of attorney to that effect, duly executed and acknowledged before some officer authorized by law to take acknowledgments of deeds, which power of attorney, or a copy thereof, duly certified by one of the justices (who on inspection of the original, and being satisfied of its genuineness, shall certify such copy), shall be filed among the papers in such cause or proceeding.

Justice of the peace, eligibility: Sec. 159.

Judicial officers, disqualifications: Secs. 170, 171, 172.

Ministerial officers generally: Sec. 262.

Attorneys: Sec. 275 et seq.

Eligibility and residence of justice of peace: Secs. 103, 159, post.

§ 97. The justices of the peace, and justices' clerk, and his deputy, shall receive for their official services the following salaries, and no other or further compensation, payable monthly, out of the city and county treasury, and out of the special fee fund thereof, after being first allowed and audited as other similar demands are by law required to be allowed and audited: To the presiding justice, twenty-seven hundred dollars per annum; to the other justices of the peace and the

justices' clerk, each, twenty-four hundred dollars per annum; to the deputy of the justices' clerk, twelve hundred dollars per annum.

§ 98. The justices of the peace elected in any such city and county at the general election of eighteen hundred and seventy-nine, or persons appointed to fill their places, are successors of the justices of the peace of such city and county who held office at the time of such election; and all records, registers, dockets, books, papers, causes, actions, and proceedings lodged, deposited, or pending before the justices' court or any justice of any such city and county, are transferred to the justices' court of such city and county herein provided for, which shall have the same power and jurisdiction over them as if they had been in the first instance lodged, deposited, filed, or commenced therein.

Transfer: See secs. 55, 79.

ARTICLE II.

JUSTICES' COURTS IN TOWNSHIPS.

§ 103. Justices' Courts and justices.
§ 104. Courts, where held.
§ 105. What justice may hold court for another.
§ 106. Territorial extent of civil jurisdiction.
§ 107. What justices successors of others.

§ 103. There shall be at least one justice's court in each of the townships of the State, for which one justice of the peace shall be elected by the qualified electors of the township, at the general State election next preceding the expiration of the term of office of his predecessor; provided, that in any county where, in the opinion of the board of supervisors, the public convenience requires it, the said board may, by order, provide

that two justices' courts may be established in any township, designating the same in such order; and in such case, one justice of the peace shall be elected in the manner herein provided for each of said courts. In every city having fifteen thousand and not more than thirty-four thousand inhabitants, there shall be one justice of the peace, and in every city having thirty-four thousand and not more than one hundred thousand inhabitants, two justices of the peace, to be elected in like manner by the electors of such cities, respectively; and such justices of the peace of cities, and justices' courts of cities, shall have the same jurisdiction, civil and criminal, as justices of the peace of townships and township justices' courts. No person shall be eligible to the office of justice of the peace in any city having over fifteen thousand inhabitants who has not been admitted to practice law in a court of record; and no justice of the peace shall be permitted to practice law before any other justice of the peace in the city and county in which he resides, or to have a partner engaged in the practice of law in any justice's court in such city or county. Every justice of the peace in any city having over fifteen thousand inhabitants shall receive an annual salary of two thousand dollars per annum, and shall be provided by the city authorities with a suitable office in which to hold his court. All fees which are by law chargeable for services rendered by such justices of the peace in the cities aforesaid shall be by them, respectively, collected; and on the first Monday in each month every such city justice of the peace shall make report, under oath, to the city treasurer, of the amount of fees so by him collected, and pay the amount so reported into the city treasury, to the credit of the general fund thereof.

Sec. 2. The term of office of justices of the peace now elected shall not be affected by this act. [Amendment approved March 31, 1891; Stats. 1891, p. 456; in effect immediately.]

Eligibility of justices of the peace: See sec. 159.

Disabilities: See post, secs. 170 et seq.

Fees: See Const. Cal., art. 6, sec. 15.

Act providing that mayor in certain cities shall not act as justices: See post, Appendix, p. 798.

Creation of justices' courts in various places: See post, Appendix, pp. 857 et seq.

§ **104**. A justice's court may be held at any place selected by the justice holding the same, in the township for which he is elected or appointed; and such court shall be always open for the transaction of business.

Always open: See secs. 47, 73, 88, ante.

§ **105**. A justice of the peace of any township, or city, or city and county may hold the court of any other justice of the peace of any township, city and county, or city within the same county, at his written request, and while so acting shall be vested with all the powers of the justice for whom he so holds court. In which case the proper entry of the proceedings before the attending justice subscribed by him shall be made in the docket of the justice for whom he so holds the court; and the same shall be prima facie evidence of such proceedings, and form and become a part of the record of any, or any part of any and all actions, causes, or proceedings had before such attending justice while so holding the court. [Approved February 16, 1897; Stats. 1897, ch. 11.]

§ **106**. The civil jurisdiction of justices' courts extends to the limits of the townships in which they are held; but mesne and final process of any

justices' court in a county may be issued to and served in any part of the county.

Jurisdiction: See sec. 94, ante, and post, secs. 112 et seq.

§ 107. The justices of the peace elected in the townships at the general State election of eighteen hundred and seventy-nine, or persons appointed to fill their places, are successors of the justices of the peace of the townships, respectively, who held office at the time of such election; and, in case the townships of any county are hereafter changed or altered, the board of supervisors of such county shall make provision as to what justices shall be successors of the justices of townships so changed or altered.

ARTICLE III.

JUSTICES OF THE PEACE AND JUSTICES' COURTS IN GENERAL.

§ 110. Terms of office.
§ 111. Vacancies.
§ 112. Civil jurisdiction.
§ 113. Concurrent jurisdiction.
§ 114. Civil jurisdiction restricted.
§ 115. Criminal jurisdiction.

§ 110. The term of office of justices of the peace shall be two years from the first day of January next succeeding their election; provided, that all justices of the peace elected at the general State election of eighteen hundred and seventy-nine shall go out of office at the end of one year from the first day of January, eighteen hundred and eighty.

§ 111. If a vacancy occurs in the office of a justice of the peace, the board of supervisors of

the county shall appoint an eligible person to hold the office for the remainder of the unexpired term.

§ 112. The justices' courts shall have civil jurisdiction:

1. In actions arising on contract for the recovery of money only if the sum claimed, exclusive of interest, does not amount to three hundred dollars;

2. In actions for damages for injury to the person, or for taking, detaining, or injuring personal property, or for injury to real property where no issue is raised by the verified answer of the defendant involving the title to or possession of the same, if the damage claimed do not amount to three hundred dollars;

3. In actions to recover the possession of personal property, if the value of such property does not amount to three hundred dollars;

4. In actions for a fine, penalty, or forfeiture, not amounting to three hundred dollars, given by statute, or the ordinance of an incorporated city and county, city or town, where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine;

5. In actions upon bonds or undertakings conditioned for the payment of money, if the sum claimed does not amount to three hundred dollars, though the penalty may exceed that sum;

6. To take and enter judgment for the recovery of money on the confession of a defendant, when the amount confessed, exclusive of interest, does not amount to three hundred dollars.

Local and special legislation with respect to court of inferior jurisdiction is prohibited by article 4, section 25, constitution of 1879.

§ 113. The justices' courts shall have concurrent jurisdiction with the Superior Courts within their respective townships:

1. In actions of forcible entry and detainer, where the rental value of the property entered upon or unlawfully detained does not exceed twenty-five dollars per month, and the whole amount of damages claimed does not exceed two hundred dollars;

2. In actions to enforce and foreclose liens on personal property, where neither the amount of the liens nor the value of the property amounts to three hundred dollars.

Const. Cal., art. 6, sec. 11.

Forcible entry: See post, sec. 1159 et seq.

§ 114. Except as in the last preceding section provided, the jurisdiction of the justices' courts shall not, in any case, trench upon the jurisdiction of the several courts of record of the State, nor extend to any action or proceeding against ships, vessels, or boats, for the recovery of seamen's wages for a voyage performed in whole or in part without the waters of this State.

Const. Cal., art. 6, sec. 11.

Actions against vessels: Sec. 813 et seq.; sec. 825.

§ 115. The justices' courts shall have jurisdiction of the following public offenses committed within the respective counties in which such courts are established:

1. Petit larceny;

2. Assault or battery not charged to have been committed upon a public officer in the discharge of his duties, or to have been committed with such intent as to render the offense a felony;

3. Breaches of the peace, riots, routs, affrays,

committing a willful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment.

Act conferring power to act as police judges: See post, Appendix, p. 798.

CHAPTER VI.

POLICE COURTS.

§ 121. Provided for in Political Code.

§ 121. Police courts are established in incorporated cities and counties, cities, and towns, and their organization, jurisdiction, and powers provided for in the Political Code, part four.

Proceedings in civil actions: See post, sec. 929.

Police courts generally, their organization and jurisdiction: See Polit. Code, secs. 4424 et seq.

Act providing that mayors in certain cities shall not be required to act as police judge: See post, Appendix, p. 798.

Act transferring business to after new constitution: See post, Appendix, p. 865.

CHAPTER VII.

GENERAL PROVISIONS RESPECTING COURTS OF JUSTICE.

Article I. Publicity of Proceedings.
II. Incidental Powers and Duties of Courts.
III. Judicial Days.
IV. Proceedings in Case of Absence of Judge.
V. Provisions Respecting Places of Holding Courts.
VI. Seals of Courts.

ARTICLE I.

PUBLICITY OF PROCEEDINGS.

§ 124. Sittings, public.
§ 125. Sittings, when private.

§ **124.** The sittings of every court of justice shall be public, except as provided in the next section.

U. S. Const., art. 6, sec. 1, amdts.

The original of the various sections of this chapter will be found in Stats. 1863, pp. 340 et seq.

§ **125.** In an action for divorce, criminal conversation, seduction, or breach of promise of marriage, the court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons except the officers of the court, the parties, their witnesses, and counsel; provided, that in any cause the court may, in the exercise of a sound discretion, during the examination of a witness, exclude any or all other witnesses in the cause.

Divorce generally: Sec. 76, subd. 4. Testimony kept secret, Polit. Code, sec. 1032.

Exclusion of witnesses: Sec. 2043.

ARTICLE II.

INCIDENTAL POWERS AND DUTIES OF COURTS.

§ 128. Powers respecting conduct of proceedings.
§ 129. Courts of record may make rules.
§ 130. When rules take effect.

§ 128. Every court shall have power:

1. To preserve and enforce order in its immediate presence;

2. To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority;

3. To provide for the orderly conduct of proceedings before it, or its officers;

4. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein;

5. To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto;

6. To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this Code;

7. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties;

8. To amend and control its process and orders so as to make them conformable to law and justice.

Power of judicial officers: See post, sec. 177.

Contempt: See post, sec. 1209. Same in justice's court: See secs. 906 et seq.

Subd. 6. Attendance of witnesses: See post, secs. 1985 et seq.

Subd. 7. Administration of oaths: See post, secs. 2093 et seq.

§ 129. Every court of record may make rules not inconsistent with the laws of this State, for its own government and the government of its officers; but such rules shall neither impose any tax or charge upon any legal proceeding, nor give any allowance to any officer for services.

Powers of courts, judges, etc.: See secs. 128, 177.

When rules take effect: Sec. 130.

§ 130. Rules adopted by the Supreme Court shall take effect sixty days, and rules adopted by Superior Courts, thirty days after their publication.

ARTICLE III.

JUDICIAL DAYS.

§ 133. Days on which courts, etc., may be held.
§ 134. Nonjudicial days.
§ 135. Appointments on nonjudicial days.

§ 133. Courts of justice may be held and judicial business transacted on any day, except as provided in the next section.

§ 134. No court shall be open, nor shall any judicial business be transacted, on Sunday, on the first day of January, on the twenty-second day of February, on the thirtieth day of May, on the fourth day of July, on the ninth day of September, on the first Monday of September, on the twenty-fifth day of December, on a day upon which an election is held throughout the State, or by the Governor of this State, for a public fast, thanksgiving, or holiday, except for the following purposes:

1. To give, upon their request, instructions to a jury when deliberating on their verdict;

2. To receive a verdict or discharge a jury;

3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature; provided, that the Supreme Court and the Superior Courts shall always be open for the transaction of business; and provided further, that injunctions and writs of prohibition may be issued and served on any day. [Approved February 23, 1897; Stats. 1897, ch. 19. In effect immediately.]

This section was also amended in 1891; Stats. 1891, p. 456.

Holidays: Secs. 10, 11; also, secs. 12, 13.

Courts always open: Secs. 47, 73, 104.

Injunctions and writs of prohibition, issuance of: Sec. 76, subd. 5; and Const. Cal., art. 6, sec. 5.

§ **135.** If any day mentioned in the last section happens to be the day appointed for the holding or sitting of a court, or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day.

ARTICLE IV.

PROCEEDINGS IN CASE OF ABSENCE OF JUDGE.

§ 139. Adjournment for absence of judge.
§ 140. Adjournment till next regular session.

§ **139.** If no judge attend on the day appointed for the holding or sitting of a court, or on the day to which it may have been adjourned, before noon, the sheriff or clerk shall adjourn the same until the next day, at 10 o'clock a. m., and if no judge attend on that day, before noon, the sheriff or clerk shall adjourn the same until the following day at the same hour, and so on, from day to day,

for one week, unless the judge, by written order, directs it to be adjourned to some day certain, fixed in said order, in which case it shall be so adjourned.

Nonjudicial day: Sec. 135.

§ 140. If no judge attend for one week, and no written order be made, as provided in the last section, the sheriff or clerk shall adjourn the session until the time appointed for the holding of the next regular session.

Sessions: See sec. 73.

ARTICLE V.

PROVISIONS RESPECTING PLACES OF HOLDING COURTS.

§ 142. Change in certain cases of place of holding court.
§ 143. Parties to appear at place appointed.
§ 144. When Sheriff to provide court-rooms, etc.

§ 142. The judge or judges authorized to hold or preside at a court appointed to be held at a particular place in a city and county, county, city, or town, may, by an order filed with the city and county or county clerk, and published as he or they may prescribe, direct that the court be held or continued at any other place in the city and county, county, city or town than that appointed, when war, insurrection, pestilence, or other public calamity, or the danger thereof, or the destruction or danger of the building appointed for holding the court, may render it necessary; and may, in the same manner, revoke the order, and in his or their discretion, appoint another place in the same city and county, county, city, or town, for holding the court.

§ 143. When the court is held at a place appointed, as provided in the last section, every per-

son held to appear at the court must appear at the place so appointed.

§ 144. If suitable rooms for holding the Superior Courts and the chambers of the judges of said courts be not provided in any city and county, or county, by the supervisors thereof, together with the attendants, furniture, fuel, lights, and stationery sufficient for the transaction of business, the courts, or the judge or judges thereof, may direct the sheriff of the city and county, or county, to provide such rooms, attendants, furniture, fuel, lights, and stationery; and the expenses incurred, certified by the judge or judges to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof.

ARTICLE VI.

SEALS OF COURTS.

§ 147. What courts shall have seals.
§ 148. Seal of Supreme Court.
§ 149. Seals of Superior Courts.
§ 150. Seals of Police Courts of cities and counties.
§ 151. Seals, how provided: private seals, when used.
§ 152. Clerk of court to keep seal.
§ 153. Seals of courts, to what documents affixed.

§ 147. Each of the following courts shall have a seal:

1. The Supreme Court;
2. The Superior Courts;
3. The Police Court of every city and county.

Seal of court—Judicial notice taken of: Sec. 1875, subd. 4; court commissioner may provide official seal, sec. 259, subd. 5.

Seals discussed: Sec. 14, and sec. 150.

Police courts are not courts of record: See ante,

secs. 33, 34; and yet have a seal: Supra, this section.

§ 148. The seal used by the Supreme Court, abolished by the constitution, shall be the seal of the Supreme Court herein provided for; but the said court may direct the clerk of the Supreme Court to provide two duplicates of said seal, each of which shall be considered the same as and have the same force and effect as the original.

§ 149. The seals of the Superior Courts shall be circular, not less than one and three-fourths inches in diameter, and having in the center any word, words, or design adopted by the judges thereof, and the following inscription surrounding the same: "Superior Court, ——, California," inserting the name of the county, or city and county; provided, that the seal of any such court, which has been adopted previous to the passage of this act, shall be the seal of such court, until another be adopted.

See Act of March 31, 1880, validating writs, process and certificates issued from Superior Courts before seal provided: See post, Appendix, p. 864.

§ 150. The police court of every city and county may use any seal having upon it the inscription, "Police Court, ——," (inserting the name of the city and county).

§ 151. Courts which have not the necessary seal provided, or the judge or judges thereof, shall request the supervisors of their respective counties or cities and counties, to provide the same, and in case of their failure to do so, may order the sheriff to provide the same, and the expense thereof shall be a charge against the county or

city and county treasury, and paid out of the general fund thereof; and until such seal be provided, the clerk of each court may use his private seal, whenever a seal is required.

§ 152. The clerks of the court shall keep the seal thereof.

§ 153. The seal of a court need not be affixed to any proceeding therein or document, except:

1. To a writ;

2. To the certificate of probate of a will, or of the appointment of an executor, administrator, or guardian;

3. To the authentication of a copy of a record, or other proceeding of a court, or of an officer thereof, or of a copy of a document on file in the office of the clerk.

Seals, generally: Sec. 14.

TITLE II.

JUDICIAL OFFICERS.

Chapter I. Judicial Officers in General, §§ 156-161.
II. Powers and Duties of Judges at Chambers, §§ 165-166.
III. Disqualifications of Judges, §§ 170-172.
IV. Incidental Powers and Duties of Judicial Officers, §§ 176-179.
V. Miscellaneous Provisions Respecting Courts and Judicial Officers, §§ 182-187.

CHAPTER I.

JUDICIAL OFFICERS IN GENERAL.

§ 156. Qualifications of Justices of Supreme Court.
§ 157. Qualifications of Superior Judges.
§ 158. Residence of Superior Judges.
§ 159. Residence and qualification of Justices of the Peace.
§ 160. Judges holding Superior Courts at request of Governor.
§ 161. Justices and judges ineligible to other than judicial office.

§ 156. No person shall be eligible to the office of chief or associate justice of the Supreme Court, unless he shall have been a citizen of the United States and a resident of this State for two years next preceding his election or appointment, nor unless he shall have been admitted to practice before the Supreme Court of the State.

The various sections of this title are founded upon the statute of 1863, pp. 333 et seq., unless otherwise stated.

Judge must be an attorney: Const. Cal., art. 6, sec. 23.

§ 157. No person shall be eligible to the office of judge of a Superior Court unless he shall have been a citizen of the United States and a resident of this State, for two years next preceding his election or appointment, nor unless he shall have been admitted to practice before the Supreme Court of the State.

§ 158. Each judge of a Superior Court shall reside at the county seat of the county in which such court is held, or within three miles thereof, and within the county, except that in the counties of Yuba and Sutter the judge may reside in either of said counties; provided, that when there is more than one judge of the Superior Court in a county, it shall not be necessary for more than one judge to reside at the county seat, as provided herein. [Amendment approved March 31, 1891; Stats. 1891, p. 277.]

§ 159. Every justice of the peace shall reside in the city and county, or township, in which his court is held, and no person shall be eligible to the office of justice of the peace unless he shall have been a citizen of the United States, and a resident of the city and county, or county, in which he is to serve for one year next preceding his election or appointment.

§ 160. If, by reason of sickness, absence, disability, or other cause, a regular session of the Superior Court cannot be held in any county by the judge or judges thereof, or by a superior judge, requested by him or them to hold such court, a certificate of that fact shall be transmitted by the clerk thereof to the governor, who may thereupon request some other superior judge to hold such court; and a judge so holding a court, at the request of the governor, or at the request of the

judge or judges of said Superior Court, shall be allowed his actual and necessary expenses in going to, returning from, and attending upon the business of such court, which shall be a charge against the treasury of the county where such court is held, and paid out of the general fund thereof. [Amendment approved March 15, 1887; Stats. 1887, p. 148. In effect March 16, 1887.]

See sec. 71.

§ 161. The justices of the Supreme Court and judges of the Superior Courts shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected.

Const. Cal., art. 6, sec. 18.

CHAPTER II.

POWERS OF JUDGES AT CHAMBERS.

§ 165. Powers of Justices of Supreme Court at chambers.
§ 166. Powers of Superior Judges at chambers.

§ 165. The justices of the Supreme Court, or any of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an ex parte application, except writs of mandamus, certiorari, and prohibition; and may, in their discretion, hear applications to discharge such orders and writs.

See sec. 176; also secs. 177, 178, 179.

§ 166. The judge or judges of a Superior Court, or any of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an ex parte application, and may, at chambers, hear and dispose of such or-

ders and writs; and may also, at chambers, appoint appraisers, receive inventories and accounts to be filed, suspend the powers of executors, administrators, or guardians in the cases allowed by law, grant special letters of administration or guardianship, approve claims and bonds, and direct the issuance from the court of all writs and process necessary in the exercise of their powers in matters of probate.

See, generally, sec. 176, post.

Hours, etc., for official business: Polit. Code, sec. 4116.

Probate matters: See sec. 1305.

CHAPTER III.

DISQUALIFICATIONS OF JUDGES.

§ 170. Disqualifications to sit or act.
§ 171. Certain judges not to practice law.
§ 172. No judicial officer to have partner practicing law.

§ 170. No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding:

1. To which he is a party or in which he is interested.

2. When he is related to either party, or to an attorney, counsel, or agent of either party, by consanguinity or affinity, within the third degree, computed according to the rules of law.

3. When he has been attorney or counsel for either party in the action or proceeding.

4. When it appears from the affidavit or affidavits on file that either party cannot have a fair and impartial trial before any judge of a court of record about to try the case by reason of the prejudice or bias of such judge, said judge shall forthwith secure the services of some other judge, of the same or another county, to preside at the

trial of said action or proceeding; provided, that in an action in the Superior Court of a county, or of a city and county, having more than one department, said action shall be transferred to another department thereof, and tried therein in the same manner as though originally assigned to such department. The affidavit or affidavits alleging the disqualification of a judge, must be filed and served upon the adverse party or the attorney for such party at least one day before the day set for trial of such action or proceeding; provided, counter affidavits may be filed at least one day thereafter, or such further time as the court may extend the time for filing such counter affidavits, not exceeding five days, and for this purpose the court may continue the trial; and in no one cause or proceeding can more than one such change of judges be had. But the provisions of this section shall not apply to the arrangement of the calendar, or to the regulation of the order of business, nor the power of transferring the action or proceeding to some other court, or the hearing upon such affidavits and counter affidavits. [Approved March 31, 1897; Stats. 1897, ch. 190.]

This section was also amended January 1, 1893; Stats. 1893, p. 234.

Change of venue: Sec. 397, subd. 4; sec. 398.

Rules of law, Civ. Code, secs. 1392, 1393.

Subd. 3. Judge, acting as attorney: Secs. 171, 172.

§ 171. No justice, or judge of a court of record, or county clerk, shall practice law in any court of this State, nor act as attorney, agent, or solicitor in the prosecution of any claim or application for lands, pensions, patent rights, or other proceedings, before any department of the State or general government, or courts of the United States,

during his continuance in office; nor shall any justice of the peace practice law before any justice's court in the county in which he resides. [Amendment approved March 14, 1881; Stats. 1881, 78. In effect March 14th, 1881.]

§ 172. No justice, judge, or other elective judicial officer, or court commissioner, shall have a partner acting at attorney or counsel in any court of this State.

CHAPTER IV.

INCIDENTAL POWERS AND DUTIES OF JUDICIAL OFFICERS.

§ 176. Powers of judges out of court.
§ 177. Powers of judicial officers as to conduct of proceedings.
§ 178. To punish for contempt.
§ 179. To take acknowledgments and affidavits.

§ 176. A justice or judge may exercise out of court all the powers expressly conferred upon a justice or judge, as contradistinguished from the court.

See secs. 165, 166, 179.

§ 177. Every judicial officer shall have power:

1. To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty;

2. To compel obedience to his lawful orders as provided in this Code;

3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this Code;

4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties.

See sec. 128.

§ 178. For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt in the cases provided in this Code.

Contempt—generally, sec. 1209; in Justices' Courts, sec. 906.

§ 179. Each of the Justices of the Supreme Court, and Judges of the Superior Courts, shall have power in any part of the State, and every Justice of the Peace within his city and county, or county, and a Judge of a Police or inferior court within his city and county, city, or town, to take and certify:

1. The proof and acknowledgment of a conveyance of real property, or of any other written instrument;

2. The acknowledgment of satisfaction of a judgment of any court;

3. An affidavit or deposition to be used in this State.

Subd. 1. Real property—conveyance of: See sec. 1971; see Civ. Code, secs. 1180 et seq.

Subd. 2. Satisfaction of judgment, sec. 675.

Subd. 3. Affidavit, sec. 2009 et seq. Deposition, sec. 2019 et seq.

CHAPTER V.

MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS.

§ 182. Subsequent applications for orders refused, when prohibited.
§ 183. Violations of preceding section.
§ 184. Proceedings not affected by vacancy in office.
§ 185. Proceedings to be in English language.
§ 186. Abbreviations and figures.
§ 187. Means to carry jurisdiction into effect.

§ 182. If an application for an order made to a Judge of a court in which the action or proceed-

ing is pending is refused in whole or in part, or is granted conditionally, no subsequent application for the same order shall be made to any Court commissioner, or any other judge, except of a higher court; but nothing in this section applies to motions refused for informality in the papers or proceedings necessary to obtain the order, or to motions refused with liberty to renew the same.

Orders and motions generally, sec. 1003 et seq.
Orders, appealable, sec. 939, subd. 3.

§ 183. A violation of the last section may be punished as a contempt; and an order made contrary thereto may be revoked by the judge or commissioner who made it, or vacated by a judge of the court in which the action or proceeding is pending.

Penalty for violation: See secs. 906, 1209.
Ex parte order, vacating or modifying, sec. 937.

§ 184. No proceeding in any court of justice, in an action or special proceeding pending therein, shall be affected by a vacancy in the office of all or any of the judges thereof.

Vacancy, secs. 42, 70.

§ 185. Every written proceeding in a court of justice in this State shall be in the English language, and judicial proceedings shall be conducted, preserved, and published in no other.

Words and phrases, interpretation of, secs. 16, 17.

§ 186. Such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals in the customary manner.

§ 187. When jurisdiction is, by the Constitution of this Code, or by any other statute, conferred on a court or judicial officer, all the means

necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code.

TITLE III.

PERSONS SPECIALLY INVESTED WITH POWERS OF A JUDICIAL NATURE.

Chapter I. Jurors, §§ 190-254.
II. Court Commissioners, §§ 258, 259.

CHAPTER I.

JURORS.

Article I. Jurors in General.
II. Qualifications and Exemptions of Jurors.
III. Of Selecting and Returning Jurors for Courts of Record.
IV. Of Drawing Jurors for Courts of Record.
V. Of Summoning Jurors for Courts of Record.
VI. Of Summoning Jurors for Courts not of Record.
VII. Of Summoning Jurors of Inquest.
VIII. Obedience to Summons, how Enforced.
IX. Of Impaneling Grand Juries.
X. Of Impaneling Trial Juries in Courts of Record.
XI. Of Impaneling Trial Juries in Courts not of Record.
XII. Of Impaneling Juries of Inquest.

ARTICLE I.

JURORS IN GENERAL.

§ 190. Jury defined.
§ 191. Different kinds of juries.
§ 192. Grand jury defined.
§ 193. Trial jury defined.
§ 194. Number of a trial jury.
§ 195. Jury of inquest defined.

§ 190. A jury is a body of men temporarily selected from the citizens of a particular district,

and invested with power to present or indict a person for a public offense, or to try a question of fact.

Jurors, qualifications and exemptions, secs. 198-202; selecting and summoning, secs. 204-238; impaneling, secs. 241-254.

§ **191.** Juries are of three kinds:
1. Grand juries;
2. Trial juries;
3. Juries of inquest.

§ **192.** A grand jury is a body of men, nineteen in number, returned in pursuance of law, from the citizens of a county, or city and county, before a court of competent jurisdiction, and sworn to inquire of public offense committed or triable within the county, or city and county.

Grand jury, impaneling, secs. 241-242. How often drawn, Const. Cal. art. 1, sec. 8.

§ **193.** A trial jury is a body of men returned from the citizens of a particular district before a court or officer of competent jurisdiction, and sworn to try and determine, by verdict, a question of fact.

Trial by jury, secs. 600-619.

Verdict, when need not be unanimous, Const. Cal. art. 1, sec. 7. See also, sec. 618.

§ **194.** A trial jury shall consist of twelve men; provided, that in civil actions and cases of misdemeanor, it may consist of twelve, or of any number less than twelve, upon which the parties may agree in open court.

Less than twelve, Const. Cal. art. 1, sec. 7.

§ **195.** A jury of inquest is a body of men summoned from the citizens of a particular district before the Sheriff, Coroner, or other ministerial officer, to inquire of particular facts.

ARTICLE II.

QUALIFICATIONS AND EXEMPTIONS OF JURORS.

§ 198. Who competent to act as juror.
§ 199. Who not competent to act as juror.
§ 200. Who exempt from jury duty.
§ 201. Who may be excused.
§ 202. Affidavit of claim to exemption.

§ **198.** A person is competent to act as juror if he be:

1. A citizen of the United States of the age of twenty-one years, who shall have been a resident of the State one year, and of the county, or city and county, ninety days before being selected and returned;

2. In possession of his natural faculties, and of ordinary intelligence, and not decrepit.

3. Possessed of sufficient knowledge of the English language;

4. Assessed on the last assessment roll of the county, or city and county, on property belonging to him.

Residence, generally: See Const. Cal. art. 2, sec. 4, art. 20, sec. 12; Polit. Code, sec. 52.

§ **199.** A person is not competent to act as a juror:

1. Who does not possess the qualifications prescribed by the preceding section; or,

2. Who has been convicted of malfeasance in office, or any felony or other high crime.

§ **200.** A person is exempt from liability to act as a juror if he be:

1. A judicial, civil, or military officer of the United States, or of this State;

2. A person holding a county, city and county, or township office;

3. An attorney at law;

4. A minister of the gospel, or a priest of any denomination following his profession;

5. A teacher in a university, college, academy, or school;

6. A practicing physician or druggist actually engaged in the business of dispensing medicines;

7. An officer, keeper or attendant of an almshouse, hospital, asylum, or other charitable institution;

8. Engaged in the performance of duty as officer or attendant of the State prison or of a county jail;

9. Employed on board of a vessel navigating the waters of this State;

10. An express agent, mail carrier, superintendent, employé, or operator of a telegraph line doing a general telegraph business in this State, or keeper of a public ferry or toll-gate;

11. An active member of the National Guard of California, or an active member of a fire department of any city and county, city, town, or village in this State, or an exempt member of a duly organized fire company;

12. A superintendent, engineer, or conductor on a railroad; or,

13. A person drawn as a juror in any court of record in this State, upon a regular panel, who has served as such within a year; but this exemption shall not extend to a person who is summoned as a juror for the trial of a particular case. [Approved March 27, 1897; Stats. 1897, c. 125. In effect immediately.]

Exemption, how claimed, sec. 202.

Subd. 11. Exempt fireman, Polit. Code, secs. 3339, 3340.

§ **201.** A juror shall not be excused by a court for slight or trivial cause, or for hardship or inconvenience to his business, but only when material injury or destruction to his property, or of property intrusted to him, is threatened, or when his own health, or the sickness or death of a member of his family, requires his absence.

§ **202.** If a person exempt from liability to act as a juror, as provided in section two hundred, be summoned as a juror, he may make and transmit his affidavit to the Clerk of the Court for which he is summoned, stating his office, occupation, or employment; and such affidavit shall be delivered by the Clerk to the Judge of the court where the name of such person is called, and if sufficient in substance, shall be received as an excuse for non-attendance in person. The affidavit shall then be filed by the Clerk.

ARTICLE III.

OF SELECTING AND RETURNING JURORS.

§ 204. Jury lists, by whom and when to be made.
§ 205. How selection shall be made.
§ 206. Lists to contain how many names.
§ 208. Lists to be placed with Clerk.
§ 209. Duty of Clerk; jury boxes.
§ 210. Regular jurors to serve one year.
§ 211. Jurors to be drawn from boxes.

§ **204.** In the month of January in each year it shall be the duty of the Superior Court in each of the counties of this State, to make an order designating the estimated number of grand jurors, and also the number of trial jurors, that will, in the opinion of said court, be required for the transac-

tion of the business of the court and the trial of causes therein during the ensuing year, and immediately after said order designating the estimated number of grand jurors shall be made, the court shall select and list the grand jurors required by said order to serve as grand jurors in said Superior Court during the ensuing year, or until new lists of jurors shall be provided; and said selections and listings shall be made of persons suitable and competent to serve as jurors, as set forth and required in sections two hundred and five and two hundred and six of this Code, which list of persons so selected shall at once be placed in the possession of the County Clerk; and immediately after said order designating the estimatd number or trial jurors shall be made, the Board of Supervisors shall select, as provided in sections two hundred and five and two hundred and six of this Code, a list of persons to serve as trial jurors in the Superior Court of said county during the ensuing year, or until a new list of jurors shall be provided. In counties and cities and counties having a population of one hundred thousand inhabitants or over, such selection shall be made by a majority of the judges of the Superior Courts. [Amendment approved March 23, 1893; Stats. 1893, 297.]

§ 205. The selections and listings shall be made of persons suitable and competent to serve as jurors, who are assessed on the last preceding assessment roll of such county or city and county, and in making such selections they shall take the names of such only as are not exempt from serving, who are in the possession of their natural faculties, and not infirm or decrepit, of fair character and approved integrity, and of sound judgment. [Amendment approved March 23, 1893; Stats. 1893, 297.]

§ 206. The list of jurors, to be made as provided in the preceding section, shall contain the number of persons which shall have been designated by the court in its order. The names for such lists shall be selected from the different wards or townships of the respective counties, in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making said lists; and said lists shall be kept separate and distinct one from the other. [Amendment approved March 7, 1881; Stats. 1881, 70. In effect January 1, 1882.]

§ 207. [In enacting new section this number was omitted.]

§ 208. A certified list of the persons selected to serve as trial jurors shall at once be placed in the possession of and filed with the Clerk of the Superior Court. [Amendment approved March 23, 1893; Stats. 1893, 297.]

§ 209. On receiving such lists, the County Clerk shall file the same in his office, and write down the names contained thereon on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon. He shall deposit the pieces of paper having on them the names of the persons selected to serve as grand jurors in a box, to be called the "grand jury box"; and those having on them the names of the persons selected to serve as trial jurors, in a box to be called the "trial jury box." [Amendment approved March 7, 1881; Stats. 1881, 70. In effect July 1, 1882.]

§ 210. The persons whose names are so returned shall be known as regular jurors, and shall serve for one year, and until other persons are selected and returned.

§ 211. The names of persons drawn for grand jurors shall be drawn from the "grand jury box," and the names of persons for trial jurors shall be drawn from the "trial jury box"; and if, at the end of the year, there shall be the names of persons in either of the said jury boxes who may not have been drawn during the year to serve, and have not served as jurors, the names of such persons may be placed on the list of jurors drawn for the succeeding year. [Amendment approved March 7, 1881; Stats. 1881, 70. In effect January 1, 1882.]

ARTICLE IV.

OF DRAWING JURORS FOR COURTS OF RECORD.

§ 214. Order of judge or judges for drawing of jury.
§ 215. Sheriff to be notified.
§ 219. Drawing, how conducted.
§ 220. Preservation of ballots drawn.

§ 214. Whenever the business of the Superior Court shall require the attendance of a trial jury for the trial of criminal cases, or where a trial jury shall have been demanded in any cause or causes at issue in said court, and no jury is in attendance, the court may make an order directing a trial jury to be drawn, and summoned to attend before said court. Such order shall specify the number of jurors to be drawn, and the time at which the jurors are required to attend. And the court may direct that such causes, either criminal or civil, in which a jury may be required, or in which a jury may have been demanded, be continued and fixed for trial when a jury shall be in attendance.

See sec. 226, post.
Superior Courts, secs. 65-79.

§ 215. Immediately upon the order mentioned in the preceding section being made, the clerk shall, in the presence of the court, proceed to draw the jurors from the "trial jury box." [Amendment approved March 7, 1881; Stats. 1881, 71. In effect January 1, 1882.]

§§ 216, 217, 218. No sections of these numbers.

§ 219. The clerk must conduct said drawing as follows:

1. He must shake the box containing the names of the trial jurors, so as to mix the slips of paper upon which such names are written, as well as possible; he must then draw from said box as many slips of paper as are ordered by the court.

2. A minute of the drawing shall be entered in the minutes of the court, which must show the name on each slip of paper so drawn from said jury box.

3. If the name of any person is drawn from said box who is deceased or insane, or who may have permanently removed from the county, or who is exempt from jury service, and the fact shall be made to appear to the satisfaction of the court, the name of such person shall be omitted from the list, and the slip of paper having such name on it shall be destroyed, and another juror drawn in his place, and the fact shall be entered upon the minutes of the court. The same proceeding shall be had as often as may be necessary, until the whole number of jurors required be drawn. After the drawing shall be completed, the clerk shall make a copy of the list of names of the persons so drawn, and certify the same. In his certificate he shall state the date of the order and of the drawing, and the number of the jurors drawn, and the time when and the place where such jurors are

required to appear. Such certificate and list shall be delivered to the Sheriff for service. [Amendment approved March 7, 1881; Stats. 1881, 71. In effect January 1, 1882.]

§ 220. After a drawing of persons to serve as jurors, the Clerk shall preserve the ballots drawn, and at the close of the session or sessions for which the drawing was had, he shall replace in the proper box from which they were taken all ballots which have on them the names of persons, who did not serve as jurors for the session or sessions aforesaid, and who are not exempt or incompetent.

ARTICLE V.

OF SUMMONING JURORS FOR COURTS OF RECORD.

§ 225. Sheriff to summon jurors, how.
§ 226. Of drawing and summoning jurors to attend forthwith.
§ 227. Of summoning jurors to complete a panel.
§ 228. Compensation of elisor.

§ 225. The Sheriff, as soon as he receives the list or lists of jurors drawn, shall summon the persons named therein to attend the court at the opening of the regular session thereof, or at such session or time as the court may order, by giving personal notice to that effect to each of them, or by leaving a written notice to that effect at his place of residence, with some person of proper age, and shall return the list to the court at the opening of the regular session thereof, or at such session, or time as the jurors may be ordered to attend, specifying the names of those who were summoned, and the manner in which each person was notified.

§ 226. Whenever jurors are not drawn or summoned to attend any court of record or session thereof, or a sufficient number of jurors fail to appear, such court may order a sufficient number to be forthwith drawn and summoned to attend the court, or it may, by an order entered in its minutes, direct the Sheriff, or an elisor chosen by the court, forthwith to summon so many good and lawful men of the county, or city and county, to serve as jurors, as may be required, and in either case such jurors must be summoned in the manner provided in the preceding section.

§ 227. When there are not competent jurors enough present to form a panel the court may direct the Sheriff, or an elisor chosen by the court, to summon a sufficient number of persons having the qualifications of jurors to complete the panel, from the body of the county, or city and county, and not from the bystanders; and the Sheriff or elisor shall summon the number so ordered accordingly and return the names to the court.

§ 228. An elisor who shall, by order of a court of record, summon persons to serve as jurors, shall be entitled to a reasonable compensation for his services, which must be fixed by the court and paid out of the county or city and county treasury, and out of the general fund thereof.

ARTICLE VI.

OF SUMMONING JURORS FOR COURTS NOT OF RECORD.

§ 230. Jurors for Justices' or Police Courts.
§ 231. How to be summoned.
§ 232. Officer's return.

§ 230. When jurors are required in any of the Justices' Courts, or in any police or other inferior

court, they shall, upon the order of the Justice, or any one of the justices where there is more than one, or of the Judge thereof, be summoned by the Sheriff, constable, marshal, or policeman of the jurisdiction.

Cause of challenge in justices' court in Humboldt: See post, Appendix, p. 860, Stat.

§ 231. Such jurors must be summoned from the persons competent to serve as jurors, residents of the city and county, township, city, or town in which such court has jurisdiction, by notifying them orally that they are summoned, and of the time and place at which their attendance is required.

§ 232. The officer summoning such jurors shall, at the time fixed in the order, for their appearance, return it to the court with a list of the persons summoned indorsed thereon.

ARTICLE VII.

OF SUMMONING JURIES OF INQUEST.

§ 235. How to be summoned.

§ 235. Juries of inquest shall be summoned by the officer before whom the proceedings in which they are to sit are to be had, or by any Sheriff, constable, or policeman, from the persons competent to serve as jurors, resident of the county, or city and county, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required.

ARTICLE VIII.

OBEDIENCE TO SUMMONS, HOW ENFORCED.

§ 238. Attachment and fine.

§ 238. Any juror summoned, who willfully and without reasonable excuse fails to attend, may be attached and compelled to attend; and the court may also impose a fine not exceeding fifty dollars, upon which execution may issue. If the juror was not personally served, the fine must not be imposed until upon an order to show cause an opportunity has been offered the juror to be heard.

ARTICLE IX.

OF IMPANELING GRAND JURIES.

§ 241. Grand jury, when to be impaneled.
§ 242. How constituted.
§ 243. Manner of impaneling prescribed in Penal Code.

§ 241. Every Superior Court, whenever in the opinion of the court the public interest must require it, may make and file with the County Clerk, an order directing a jury to be drawn, and designating the number, which, in case of a grand jury, shall not be less than twenty-five nor more than thirty. In all counties having less than three Superior Court judges, there shall be one grand jury drawn and impaneled in each year; and in all counties having three or more Superior Court judges, there shall be two grand juries drawn and impaneled in each year. Such order must designate the time at which the drawing will take place. The names of such jurors shall be drawn, the list of names certified and summoned, as provided for drawing and summoning trial jurors;

and the names of any persons drawn, who may not be impaneled upon the grand jury, may be again placed in the grand jury box. [Amendment approved March 7, 1881; Stats. 1881, 71. In effect January 1, 1882.]

Const. Cal. art. 1, sec. 8.

§ 242. When, of the persons summoned as grand jurors and not excused, nineteen are present, they shall constitute the grand jury. If more than nineteen of such persons are present, the Clerk shall write their names on separate ballots, which he must fold so that the names cannot be seen, place them in a box, and draw out nineteen of them, and the persons whose names are on the ballots so drawn shall constitute the grand jury. If less than nineteen of such persons are present, the panel may be filled as provided in section two hundred and twenty-six of this Code. And whenever, of the persons summoned to complete a grand jury, more shall attend than are required, the requisite number shall be obtained by writing the names of those summoned and not excused on ballots, depositing them in a box, and drawing as above provided.

§ 243. Thereafter such proceedings shall be had in impaneling the grand jury as are prescribed in Part II. of the Penal Code.

See Penal Code, secs. 894-901.

ARTICLE X.

OF IMPANELING TRIAL JURIES IN COURTS OF RECORD.

§ 246. Clerk to call list of jurors summoned.
§ 247. Manner of impaneling prescribed in part two.

§ **246.** At the opening of court on the day trial jurors have been summoned to appear, the Clerk shall call the names of those summoned, and the court may then hear the excuses of jurors summoned. The Clerk shall then write the names of the jurors present and not excused upon separate slips or ballots of paper, and fold such slips so that the names are concealed, and there, in the presence of the court, deposit the slips or ballots in a box, which must be kept sealed or locked until ordered by the court to be opened.

§ **247.** Whenever thereafter a civil action is called by the court for trial, and a jury is required, such proceedings shall be had in impaneling the trial jury as are prescribed in Part II. of this Code. If the action be a criminal one, the jury shall be impaneled as prescribed in the Penal Code.

Civil action: See secs. 600-604.
Criminal case: See Penal Code, secs. 1055-1088.

ARTICLE XI.

OF IMPANELING TRIAL JURIES IN COURTS NOT OF RECORD.

§ 250. Proceedings in forming jury.
§ 251. Manner of impaneling.

§ **250.** At the time appointed for a jury trial in Justices, Police or other inferior courts, the

list of jurors summoned must be called, and the names of those attending and not excused must be written upon separate slips of paper, folded so as to conceal the names, and placed in a box, from which the trial jury must be drawn.

§ 251. Thereafter, if the action is a criminal one, the jury must be impaneled as provided in the Penal Code; if a civil one, as provided in Part II. of this Code.

See sec. 247.

ARTICLE XII.

OF IMPANELING JURIES OF INQUEST.

§ 254. Manner of impaneling.

§ 254. The manner of impaneling juries of inquest is prescribed in the provisions of the different codes relating to such inquests.

CHAPTER II.

COURT COMMISSIONERS.

§ 258. Appointment and qualifications.
§ 259. Powers of court commissioners.

§ 258. The Superior Court of every city and county in the State may appoint six commissioners, to be designated each as "court commissioners" of such city and county; and the Superior Court of every other county in the State may appoint one commissioner, to be designated as "court commissioner" of such county. Such commissioners shall be citizens of the United States, and residents of the city and county, or county, in which

they are appointed, and hold offices during the pleasure of the courts appointing them.

Const. Cal. art. 6, sec. 14.

§ 259. Every Court Commissioner shall have power:

1. To hear and determine ex parte motions for orders and writs, except orders or writs of injunction in the Superior Court of the county, or city and county, for which he is appointed; provided, that he shall have power to hear and determine such motions only in the absence or inability to act of the Judge or Judges of the Superior Court of the county, or city and county;

2. To take proof and report his conclusions thereon as to any matter of fact other than an issue of fact raised by the pleadings, upon which information is required by the court; but any party to the proceedings may except to such report within five days after written notice that the same has been filed, and may argue his exceptions before the court on giving notice of motion for that purpose;

3. To take and approve bonds and undertakings whenever the same may be required in actions or proceedings in such Superior Courts, and to examine the sureties thereon when an exception has been taken to their sufficiency, and to administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this State, or in any matter or proceeding whatever, and to take acknowledgments and proof of deeds, mortgages, and other instruments requiring proof or acknowledgment for any purpose under the laws of this State;

4. To charge and collect the same fees for the performance of official acts as are now or may hereafter be allowed by law to notaries public in this State for like services; provided, that this

subdivision shall not apply to any services of such commissioner, the compensation for which is expressly fixed by law;

5. To provide an official seal, upon which must be engraved the words "Court Commissioner" and the name of the county, or city and county, in which said commissioner resides;

6. To authenticate with his official seal his official acts.

Judicial powers, persons having, order enforced before, sec. 128, subd. 2.

References and trials by referees: See post, secs. 638 et seq.

Subd. 4. Fees of notaries public: See Polit. Code, sec. 798. Justices of the peace and court commissioners are the only judicial officers who are authorized to receive fees: Const. Cal. art. 6, sec. 15.

Subd. 5. Official seals defined: See ante, sec. 14.

TITLE IV.

MINISTERIAL OFFICERS OF COURTS OF JUSTICE.

Chapter I. Of Ministerial Officers generally, § 262.
II. Secretaries and Bailiffs of the Supreme Court. §§ 265, 266.
III. Phonographic Reporters, §§ 268-269.

CHAPTER I.

OF MINISTERIAL OFFICERS GENERALLY.

§ 262. Election, powers, and duties, where prescribed.

§ 262. The modes and times of election, terms, powers, and duties of the Attorney General, Clerk of the Supreme Court, Reporter of the Decisions

of the Supreme Court, clerks, sheriffs, and coroners, are prescribed in the Political and Penal Codes.

Attorney General: See Polit. Code, secs. 470 et seq.

Clerk of Supreme Court: Polit Code, secs. 749 et seq.

Reporter of Supreme Court Decisions: Polit. Code, secs. 771 et seq.

County clerks: Polit Code, secs. 4204 et seq.

Sheriffs: Polit. Code, sec. 4176; Pen. Code, secs. 1216 et seq.; 1601 et seq.

Coroners: Polit. Code, secs. 4285 et seq.; Pen. Code, sec. 1510.

CHAPTER II.

SECRETARIES AND BAILIFFS OF THE SUPREME COURT.

§ 265. Appointment.
§ 236. Tenure of office, and duties.

§ 265. The Justices of the Supreme Court may appoint two secretaries and two bailiffs, who shall be citizens of the United States and of this State.

§ 266. The secretaries and bailiffs shall hold their offices at the pleasure of the justices, and shall perform such duties as may be required of them by the court or any justice thereof.

CHAPTER III.

PHONOGRAPHIC REPORTERS.

§ 268. Phonographic reporters for Supreme Courts, where provided for.
§ 269. Phonographic reporters for Superior Courts, their appointment, and duties.
§ 270. Qualifications and test of competency.
§ 271. Attention to duties; reporters pro tempore.
§ 272. Oath of office.
§ 273. Reports prima facie correct statements.
§ 274. Compensation.

§ 268. Phonographic reporters for the Supreme Court are provided for in Part III. of the Political Code.

See Polit. Code, sec. 739, as to salary, sec. 769 as to appointment, and sec. 770 as to duty, of phonographic reporter of Supreme Court.

§ 269. The Judge or Judges of any Superior Court in the State may appoint a competent phonographic reporter, or as many such reporters as there are judges, to be known as official reporter or reporters of such court, and to hold office during the pleasure of the judge or judges appointing them. Such reporter, or any one of them, where there are two or more, shall, at the request of either party, or of the court in a civil action or proceeding, and on the order of the court, the District Attorney, or the attorney for defendant in a criminal action or proceeding, take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, and oral instructions given, and if directed by the court, or requested by either party, shall within such reasonable time after the trial of such case as the court may designate, write out the same in plain,

legible long-hand, and verify and file it with the Clerk of the Court in which the case was tried.

§ 270. No person shall be appointed to the position of official reporter of any court in this State, except upon satisfactory evidence of good moral character, and without being first examined as to his competency by at least three members of the bar practicing in said court, such members to be designated by the judge or judges of said court. The committee of members of the bar so designated shall, upon the request of the Judge or judges of said court, examine any person as to his qualifications whom said Judge or judges may wish to appoint as official reporter; and no person shall be appointed to such position upon whose qualifications such committee shall not have reported favorably. The test of competency before such committee shall be as follows: The party examined must write in the presence of said committee at the rate of at least one hundred and fifty words per minute, for five consecutive minutes, upon matter not previously written by or known to him, immediately read the same back to the committee, and transcribe the same into longhand writing, plainly and with accuracy. If he pass such test satisfactorily, the committee shall furnish him with a written certificate of that fact, signed by at least a majority of the members of the committee, which certificate shall be filed among the records of the court.

§ 271. The official reporter of any Superior Court shall attend to the duties of his office in person, except when excused for good and sufficient reason by order of the court, which order shall be entered upon the minutes of the court. Employment in his professional capacity elsewhere shall

not be deemed a good and sufficient reason for such excuse. When the official reporter of any court has been excused in the manner provided in this section, the court may appoint an official reporter pro tempore, who shall perform the same duties and receive the same compensation during the term of his employment as the official reporter.

§ 272. The official reporter of any court, or official reporter pro tempore, shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office.

§ 273. The report of the official reporter, or official reporter, pro tempore, of any court, duly appointed and sworn, when written out in longhand writing, and certified as being a correct transcript of the testimony and proceedings in the case, shall be, prima facie, a correct statement of such testimony and proceedings.

§ 274. The official reporter shall receive as compensation for his services a monthly salary to be fixed by the Judge by an order duly entered on the minutes of the Court, which salary shall be paid out of the treasury of the county in the same manner and at the same time as the salaries of county officers; provided, that said monthly salary for each Superior Court, or department thereof, shall not exceed the following maximum: In counties having a population of one hundred thousand and over, three hundred dollars; in counties having a population less than one hundred thousand and exceeding fifty thousand, two hundred and seventy-five dollars; in counties having a population less than fifty thousand and exceeding thirty thousand, two hundred and fifty dollars; in counties having a population less than thirty thousand and exceeding twenty thousand, two hundred and

twenty-five dollars; in counties having a population less than twenty thousand and exceeding fifteen thousand, two hundred dollars; in counties having a population less than fifteen thousand and exceeding twelve thousand five hundred, one hundred and seventy-five dollars; in counties having a population less than twelve thousand five hundred and exceeding ten thousand, one hundred and fifty dollars; in counties having a population less than ten thousand and exceeding seven thousand five hundred, one hundred and twenty-five dollars; in counties having a population less than seven thousand five hundred and exceeding five thousand one hundred dollars; and in counties having a population less than five thousand, seventy-five dollars; and, further provided, that where both parties to a civil action, or either, require the testimony therein to be written out in full as the trial progresses, the official reporter shall be allowed the extra expense occasioned, to be audited by the Judge, and paid by the party or parties ordering the same; provided further, that in departments of Superior Courts devoted exclusively to the trial of criminal cases, the Judge of the Court shall, in addition, fix and allow a reasonable compensation for the transcription of testimony, to be paid out of the county, or city and county, treasury, upon the order of the Judge. In civil cases in which the testimony is taken down by the official reporter, each party shall pay a per diem of two dollars and fifty cents before judgment of verdict therein is entered; and where the testimony is transcribed, the party or parties ordering it shall pay ten cents per folio for such transcription on delivery thereof; said per diem and transcription fees to be paid to the Clerk of the Court, and by him paid into the treasury of the county, and such portion as shall be paid by the prevailing party may be taxed

as costs in the case. Where there is no regular official reporter, and one is appointed temporarily by the Court, he shall receive for his services and expenses of attendance, in lieu of the salary provided in this section, such compensation as the court may deem reasonable; to be paid, if a civil case, by both parties, or either of them, as the Judge shall direct; and, if a criminal case, to be paid out of the treasury of the county on the order of the court. [Amendment approved March 21, 1885; Stats. 1885. In effect March 23, 1885.]

CHAPTER I.

ATTORNEYS AND COUNSELLORS AT LAW.

§ 275. Who may be admitted as attorneys.
§ 276. Qualifications.
§ 277. Certificate of admission and license.
§ 278. Oath.
§ 279. Attorneys of other States.
§ 280. Roll of attorneys.
§ 281. Penalty for practicing without license.
§ 282. Duties.
§ 283. Authority.
§ 284. Change of attorney.
§ 285. Notice of change.
§ 286. Death or removal of attorney.
§ 287. Removal and suspension.
§ 288. Conviction of felony.
§ 289. Proceedings for removal or suspension.
§ 290. Accusation.
§ 291. Verification.
§ 292. Citation.
§ 293. Appearance.
§ 294. Objections to accusation.
§ 295. Demurrer.
§ 297. Trial.
§ 296. Answer.
§ 298. Reference to take depositions.
§ 299. Judgment.

§ 275. Any citizen or person resident of this State, who has bona fide declared his or her inten-

tion to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counsellor in all the courts of this State. All persons are attorneys of the Supreme Court who were on the first day of January, eighteen hundred and eighty, entitled to practice in the court superseded thereby.

Admission of attorneys: See sections following this.

Judges must be licensed attorneys: Secs. 156, 157.

Judicial and ministerial officers, not to practice: See Polit. Code, sec. 4121; secs. 171, 172, ante.

Removal of attorneys: See sec. 287.

§ 276. Every applicant for admission as an attorney and counsellor must produce satisfactory testimonials of a good moral character and undergo a strict examination in open court as to his qualifications, by the Justices of the Supreme Court, or by the justices sitting and holding one of the departments thereof, or by not less than three of the Supreme Court Commissioners, to be designated and appointed by the Chief Justice of the Supreme Court to conduct publicly the examination, such commissioners to report the results of the examination to the Supreme Court for final action. [Amendment approved March 16, 1895; Stats. 1895, 56. In effect March 16, 1895.]

Examination of candidate: See sec. 129; Supreme Court, rule 1.

§ 277. If, upon examination, he is found qualified, the Supreme Court, or department thereof before which he is examined, shall admit him as an attorney and counsellor in all the courts of this State, and shall direct an order to be entered to

that effect upon its records, and that a certificate of such record be given to him by the Clerk of the Court, which certificate shall be his license.

Disbarment: See sec. 287.

§ 278. Every person, on his admission, must take an oath to support the Constitution of the United States and the Constitution of the State of California, and to faithfully discharge the duties of an attorney and counsellor at law to the best of his knowledge and ability. A certificate of such oath must be indorsed upon the license.

Duties: See sec. 282.

§ 279. Every citizen of the United States, or person resident of this State, who has, bona fide, declared his intention to become a citizen in the manner required by law, who has been admitted to practice law in the highest court of a sister State, or of a foreign country, where the common law of England constitutes the basis of jurisprudence, may be admitted to practice in the courts of this State, upon the production of his or her license, and satisfactory evidence of good moral character; but the court may examine the applicant as to his or her qualifications.

"State" and "United States," defined, sec. 17, subd. 7.

§ 280. Every Clerk shall keep a roll of attorneys and counsellors admitted to practice by the court of which he is clerk, which roll must be signed by the person admitted before he receives his license.

Attorneys of the Supreme Court, sec. 275.

§ 281. If any person shall practice law in any court, except a justice's court or police court, without having received a license at attorney and counsellor, he shall be guilty of a contempt of court.

Contempt, sec 1209 et seq.
Justices' court practitioners, sec 96.

§ 282. It is the duty of an attorney and counsellor:

1. To support the Constitution and laws of the United States and of this State;

2. To maintain the respect due to the courts of justice and judicial officers;

3. To counsel or maintain such actions, proceedings, or defenses only as appear to him legal or just, except the defense of a person charged with a public offense;

4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law;

5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client;

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;

7. Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest;

8. Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed.

Subd. 1. Oath, sec. 278.
Subd. 3. Offender, public—defense of: See Penal Code, sec. 987; see also, subd. 8.

§ 283. An attorney and counsellor shall have authority:

1. To bind his client in any of the steps of an action or proceeding by his agreement filed with

the Clerk, or entered upon the minutes of the court, and not otherwise;

2. To receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

Privileged communications: See sec. 1881.

§ 284. The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:

1. Upon consent of both client and attorney, filed with the Clerk, or entered upon the minutes;

2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other.

Notice of substitution: See next section.

§ 285. When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney.

§ 286. When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

§ 287. An attorney and counsellor may be removed or suspended by the Supreme Court, or any department thereof, or by any Superior Court of the State, for either of the following causes, arising after his admission to practice:

1. His conviction of a felony or misdemeanor

involving moral turpitude, in which case the record of conviction shall be conclusive evidence;

2. Willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with, or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney and counsellor;

3. Corruptly or willfully and without authority appearing as attorney for a party to an action or proceeding;

4. Lending his name to be used as attorney and counsellor by another person who is not an attorney and counsellor.

In all cases where an attorney is removed or suspended by a Superior Court, the judgment or order of removal or suspension may be reviewed on appeal by the Supreme Court.

Attorney has right to make a defense: See sec. 292.

§ 288. In case of the conviction of an attorney or counsellor of a felony or misdemeanor, involving moral turpitude, the Clerk of the court in which such conviction is had shall, within thirty days thereafter, transmit to the Supreme Court a certified copy of the record of conviction.

§ 289. The proceedings to remove or suspend an attorney and counsellor, under the first subdivision of section two hundred and eighty-seven, must be taken by the court on the receipt of a certified copy of the record of conviction. The proceedings under the second, third, or fourth subdivisions of section two hundred and eighty-seven may be taken by the court for the matters within its knowledge, or may be taken upon the information of another.

§ 290. If the proceedings are upon the infor-

mation of another, the accusation must be in writing.

§ 291. The accusation must state the matters charged and be verified by the oath of some person to the effect that the charges therein contained are true.

§ 292. Upon receiving the accusation, the court shall make an order requiring the accused to appear and answer it at a specified time, and shall cause a copy of the order and of the accusation to be served upon the accused at least five days before the day appointed in the order.

§ 293. The accused must appear at the time appointed in the order and answer the accusations, unless for sufficient cause the court assign another day for that purpose. If he do not appear, the court may proceed and determine the accusation in his absence.

§ 294. The accused may answer to the accusation either by objecting to its sufficiency or denying it.

§ 295. If he object to the sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection. If he deny the accusation, the denial may be oral and without oath, and must be entered upon the minutes.

§ 296. If an objection to the sufficiency of the accusation be not sustained, the accused must answer within such time as may be designated by the court.

§ 297. If the accused plead guilty, or refuse to answer the accusation, the court shall proceed to judgment of removal or suspension. If he deny

the matters charged, the court shall, at such time as it may appoint, proceed to try the accusation.

§ 298. The court may, in its discretion, order a reference to a committee to take depositions in the matter.

§ 299. Upon conviction, in cases arising under the first subdivision of section two hundred and eighty-seven, the judgment of the court must be that the name of the party shall be stricken from the roll of attorneys and counsellors of the court, and that he be precluded from practicing as such attorney or counsellor in all the courts of this State; and upon conviction in cases under the other subdivisions of that section, the judgment of the court may be according to the gravity of the offense charged; deprivation of the right to practice as attorney or counsellor in the courts of this State permanently, or for a limited period.

CHAPTER II.

OTHER PERSONS INVESTED WITH SUCH POWERS.

§ 304. Receivers, executors, administrators, and guardians.

§ 304. The appointment, powers, and duties of receivers, executors, administrators, and guardians, are provided for and prescribed in parts two and three of this Code.

Receivers, secs. 564-569.

Executors and administrators, secs. 1349-1440, 1581-1591; also, secs. 1612-1653, and 1726-1743.

Guardians, secs. 1747-1809.

The foregoing section ends Part I., which was entirely amended; and the foregoing Part I. adopted as a substitute therefor, by act approved April 1, 1880—Amendments 1880, 21 (Ban. ed. 63); took effect immediately—repealed all acts and parts of acts in conflict therewith.

PART II.

OF CIVIL ACTIONS.

Title I. Form of Civil Actions, §§ 307-309.
II. Time of Commencing Civil Actions, §§ 312-362.
III. Parties to Civil Actions, §§ 367-389.
IV. Place of Trial of Civil Actions, §§ 392-400.
V. Manner of Commencing Suit, §§ 405-416.
VI. Pleadings in Civil Actions, §§ 420-476.
VII. Provisional Remedies in Civil Actions, §§ 478-574.
VIII. Trial and Judgment in Civil Actions, §§ 577-675.
IX. Execution of the Judgment in Civil Actions, §§ 681-721.
X. Actions in Particular Cases, §§ 726-827.
XI. Proceedings in Justices' Courts, §§ 832-925.
XII. Proceedings in Police Courts, §§ 929-933.
XIII. Appeals in Civil Actions, §§ 936-980.
XIV. Miscellaneous Provisions, §§ 989-1058.

TITLE I.

OF THE FORM OF CIVIL ACTIONS.

§ 307. One form of civil action only.
§ 308. Parties to actions, how designated.
§ 309. Special isues not made by pleadings, how tried.

§ 307. There is in this State but one form of civil actions for the enforcement or protection of

private rights and the redress or prevention of private wrongs.

§ 308. In such action, the party complaining is known as the plaintiff, and the adverse party as the defendant.

§ 309. A question of fact not put in issue by the pleadings may be tried by a jury, upon an order for the trial, stating distinctly and plainly the question of fact to be tried; and such order is the only authority necessary for a trial.

Equity cases, issues in, sec. 592.

TITLE II.

OF THE TIME OF COMMENCING ACTIONS.

Chapter I. The time of commencing actions in general, § 312.
II. The time of commencing actions for the recovery of real property, §§ 315-328.
III. The time of commencing actions other than for the recovery of real property, §§ 335-345.
IV. General provisions as to the time of commencing actions, §§ 350-362.

CHAPTER I.

THE TIME OF COMMENCING ACTIONS IN GENERAL.

§ 312. Commencement of civil actions.

§ 312. Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different

limitation is prescribed by statute. [Approved February 21, 1897; Stats. 1897, c. 21.]

On a current account, the cause accrues from time of last item: Sec. 344.

CHAPTER II.

THE TIME OF COMMENCING ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

§ 315. When the people will not sue.
§ 316. When action cannot be brought by grantee from the State.
§ 317. When actions by the people or their grantees are to be brought within five years.
§ 318. Seizin within five years, when necessary in action for real property.
§ 319. Such seizin, when necessary in action or defense arising out of title to or rents of real property.
§ 320. Entry on real estate.
§ 321. Possession, when presumed. Occupation deemed under legal title, unless adverse.
§ 322. Occupation under written instrument or judgment, when deemed adverse.
§ 323. What constitutes adverse possession under written instrument or judgment.
§ 324. Premises actually occupied under claim of title deemed to be held adversely.
§ 325. What constitutes adverse possession under claim of title not written.
§ 326. Relation of landlord and tenant, as affecting adverse possession.
§ 327. Right of possession not affected by descent cast.
§ 328. Certain disabilities excluded from time to commence actions.

§ 315. The people of this State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless:

1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or,

2. The people, or those from whom they claim, shall have received the rents and profits of such

real property, or of some part thereof, within the space of ten years.

Title by occupancy: Civ. Code, sec. 1007.

§ 316. No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this State, unless the same might have been commenced by the people as herein specified, in case such patent had not been issued or grant made.

§ 317. When letters patent or grants of real property issued or made by the people of this State are declared void by the determination of a competent court, an action for the recovery of the property so conveyed may be brought, either by the people of the State, or by any subsequent patentee or grantee of the property, his heirs or assigns, within five years after such determination, but not after that period. [In effect July 1, 1874.]

§ 318. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action.

Adverse possession: Sec. 321, infra.

Trespass upon real property, action for, must be brought within three years: Sec. 338, post.

Possession, presumptive evidence of ownership: See sec. 1963, subd. 11.

Action includes a special proceeding of a civil nature: Sec. 363, post.

§ 319. No cause of action, or defense to an action, arising out of the title to real property, or to

rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor or grantor of such person, was seized or possessed of the premises in question within five years before the commencement of the act in respct to which such action is prosecuted or defense made.

Action includes a special proceeding of a civil nature: Sec. 363.

§ 320. No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within five years from the time when the right to make it descended or accrued.

§ 321. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action.

Adverse possession: Secs. 322-325.
Forcible entry, one year: Sec. 1172.
Payment of taxes: See sec. 325, infra.

§ 322. When it appears that the occupant or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the

property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

Entry not under written instrument: See sec. 325.

§ 323. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved;

2. Where it has been protected by a substantial inclosure;

3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant;

4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

§ 324. Where it appears that there has been an actual, continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment,

or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

Prescription, title by Civ. Code, sec. 1007.

§ 325. For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure;

2. Where it has been usually cultivated or improved.

Provided, however, that in no case shall adverse possession be considered established under the provision of any section or sections of this Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, State, county, or municipal, which have been levied, and assessed upon such land. [Amendment approved April 1, 1878; Amendments 1878-9, 99. In effect sixty days after passage.]

§ 326. When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or where there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumption cannot be made after the periods herein limited.

Tenant denying landlord's title: Sec. 1962, subd. 4.

§ 327. The right of a person to the possession of real property is not impaired or affected by a descent cast in consequence of the death of a person in possession of such property.

§ 328. If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, be, at the time such title first descends or accrues, either:

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life; or,
4. A married woman, and her husband be a necessary party with her in commencing such action or making such entry or defense.

The time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of five years after such disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced, or entry or defense made, after that period.

See post, sec. 354.
Absence from State: See post, sec 351.
Successive disabilities: See post, sec. 358.

CHAPTER III.

THE TIME OF COMMENCING ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

§ 335. Periods of limitation prescribed.
§ 336. Within five years.
§ 337. Within four years.
§ 338. Within three years.
§ 339. Within two years.
§ 340. Within one year.
§ 341. Within six months.
§ 342. Same.
§ 343. Actions for relief not hereinbefore provided for.
§ 344. Where cause of action accrues on mutual account.
§ 345. Actions by the people subject to the limitations of this chapter.
§ 346. Action to redeem mortgage.
§ 347. Same, when some of mortgagors are not entitled to redeem.
§ 348. No limitations where money deposited in bank.

§ 335. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

§ 336. Within five years:

1. An action upon a judgment or decree of any court of the United States, or of any State within the United States;

2. An action for mesne profits of real property. [Amendment approved March 24, 1874; Amendments 1873-4, 291. In effect July 1, 1874.]

Foreign liability: Sec. 361.

§ 337. Within four years:

An action upon any contract, obligation, or liability, founded upon an instrument in writing executed in this State. [Amendment approved March 24, 1874; Amendments 1873-4, 291. In effect July 1, 1874.]

Four years—limitation where no other provision: Sec. 343.

Absence of mortgagor from State: Sec. 361, post.
Undertakings on appeal: See post, sec. 941.

§ 338. Within three years:

1. An action upon a liability created by statute other than a penalty or forfeiture;

2. An action for trespass upon real property;

3. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property;

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

Statutory penalty: See sec. 340, subd. 1.
Executor or administrator.—Limitation of actions to set aside sale, three years: Secs. 1573, 1589, post.
Corporations and stockholders, limitation as regards them: See post, sec. 359.

§ 339. Within two years:

1. An action upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the State;

2. An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution. But this subdivision does not apply to an action for an escape;

3. An action to recover damages for the death of one caused by the wrongful act or neglect of another. [Amendment approved March 24, 1874; Amendments 1873-4, 291. In effect July 1st, 1874.]

Mutual account: See post, sec. 344.
Actions for escape: See infra, sec. 340, subd. 4.

§ 340. Within one year:

1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation;

2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the people of the State;

3. An action for libel, slander, assault, battery, false imprisonment or seduction;

4. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process;

5. An action against a municipal corporation for damages or injuries to property caused by a mob or riot. [Amendment approved January 27, 1876; Amendments 1875-6, 89. In effect January 27, 1876.]

One year—forcible entry, adverse holding, sec. 1172; against decedent's representatives, sec. 353; after reversal on appeal, sec. 355; entry upon real property, sec. 320.

§ 341. Within six months:

An action against an officer, or officer de facto:

1. To recover any goods, wares, merchandise, or other property, seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure;

2. To recover stock sold for a delinquent assessment, as provided in sec. 347 of the Civil Code. [Amendment approved March 24, 1874; Amendments, 1873-4, 292. In effect July 1, 1874.]

Stock sold for assessment—Civ. Code, sec. 347.

Six months—against county, sec. 342; by decedent's representatives, sec. 353.

§ 342. Actions on claims against a county, which have been rejected by the board of supervisors, must be commenced within six months after the first rejection thereof by such board.

Action for riot: See sec. 340, subd. 5, supra.

§ 343. An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued.

Bank deposits, no limitation: Sec. 348.

§ 344. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

§ 345. The limitations prescribed in this chapter apply to actions brought in the name of the State, or for the benefit of the State, in the same manner as to actions by private parties.

Action by people: Sec. 315.

§ 346. An action to redeem a mortgage of real property with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse pos-

session of the mortgaged premises for five years after breach of some condition of the mortgage.

"Action" includes a special proceeding of a civil nature: Sec. 363.

§ **347.** If there is more than one such mortgagor, or more than one person claiming under a mortgagor, some of whom are not entitled to maintain such an action, under the provisions of this chapter, any one of them, who is entitled to maintain such an action, may redeem therein a divided or undivided part of the mortgaged premises, according as his interest may appear, and have an accounting for a part of the rents and profits, proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money, bearing the same proportion to the whole of such money as the value of his divided or undivided interest in the premises bears to the whole of such premises.

§ **348.** To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings and loan society, there is no limitation. [New section approved March 24, 1874; Amendments 1873-4, p. 293. In effect July 1st, 1874.]

See sec. 359, post.

No limitation of action for money deposited with banker: See post, Appendix, p. 874, Stat.

Lost certificates of deposit, statute relating to actions on: See post, Appendix, p. 874, Stats.

CHAPTER IV.

GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS.

§ 350. When an action is commenced.
§ 351. Exception, where defendant is out of the State.
§ 352. Exception as to persons under disabilities.
§ 353. Provision where person entitled dies before limitation expires.
§ 354. In suits by aliens, time of war to be deducted.
§ 355. Provision where judgment has been reversed.
§ 356. Provision where action is stayed by injunction.
§ 357. Disability must exist when right of action accrued.
§ 358. When two or more disabilities exist, etc.
§ 359. This title not applicable to actions against directors, etc. Limitations in such cases prescribed.
§ 360. Acknowledgment or new promise must be in writing.
§ 361. Limitation laws of other States, effect of.
§ 362. Existing causes of action not affected.
§ 363. "Action" includes a special proceeding.

§ 350. An action is commenced, within the meaning of this title, when the complaint is filed.

Stats. 1850, p. 343.

§ 351. If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.

§ 352. If a person entitled to bring an action, mentioned in chapter three of this title, be at the time the cause of action accrued, either—

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life; or,

4. A married woman, and her husband be a necessary party with her in commencing such action;

The time of such disability is not a part of the time limited for the commencement of the action.

Stats. 1863, p. 325.

Disabilities stopping running of statute: See ante, sec. 328.

§ 353. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within six months from his death. If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

Stats. 1850, p. 343.

Substitution of parties: Sec. 385.

Survival of actions: See post, secs. 1582-1584, and sec. 385.

"Action" includes a special proceeding of a civil nature: Sec. 363.

§ 354. When a person is an alien subject, or citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action.

§ 355. If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plain-

tiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal.

This and the six following sections are drawn from statutes of 1850, page 343.

§ 356. When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

§ 357. No person can avail himself of a disability, unless it existed when his right of action accrued.

Successive disabilities: See infra, sec. 358, and ante, sec. 328.

§ 358. When two or more disabilities coexist at the time the right of action accrues, the limitation does not attach until they are removed.

See supra, sec. 357.

§ 359. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.

§ 360. No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby.

§ 361. When a cause of action has arisen in another State, or in a foreign country, and by the laws

thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued.

Stats. 1852, p. 161.

§ 362. This title does not extend to actions already commenced, nor to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run, but the laws now in force are applicable to such actions and cases, and are repealed subject to the provisions of this section.

Repeal of limitations: See secs. 9, 18.

§ 363. The word "action," as used in this title, is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature.

TITLE III.

OF THE PARTIES TO CIVIL ACTIONS.

§ 367. Action to be in name of party in interest.
§ 368. Assignment of thing in action not to prejudice defense.
§ 369. Executor, trustee, etc., may sue without joining the persons beneficially interested.
§ 370. When a married woman is a party—actions by and against.
§ 371. Wife may defend, when.
§ 372. Infant to appear by guardian.
§ 373. Guardian, how appointed.
§ 374. Unmaried female may sue, for her own seduction.
§ 375. Father, etc., may sue, for seduction of daughter, etc.
§ 376. Father, etc., may sue, for injury or death of child.
§ 377. When representatives may sue for death of one caused by the wrongful act of another.
§ 378. Who may be joined as plaintiffs.
§ 379. Who may be joined as defendants.
§ 380. Parties defendant in an action to determine conflicting claims to real property.
§ 381. Parties holding title under a common source, when may join.
§ 382. Parties in interest, when to be joined. When one or more may sue or defend for the whole.
§ 383. Plaintiff may sue in one action the different parties to commercial paper.
§ 384. Tenants in common, etc., may sever in bringing or defending actions.
§ 385. Action, when not to abate by death, marriage, or other disability. Proceedings in such case.
§ 386. Another person may be substituted for the defendant.
§ 387. Intervention, when it takes place and how made.
§ 388. Associates may be sued by name of association.
§ 389. When other parties must be brought in.
§ 390. Actions against fire departments.

§ 367. Every action must be prosecuted in the name of the real party in interest, except as provided in section three hundred and sixty-nine of this Code. [Amendment approved April 15, 1880; Amendments 1880, p. 63. In effect April 15, 1880.]

Assignees: Sec. 368.

Partnerships, how may sue: See infra, sec. 388.

Parties plaintiff, generally.—All persons interested may be joined: Sec. 378, post. If any refuse, they may be made defendants: Sec. 382.

§ 368. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any setoff or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before maturity.

Assignment and survival of causes of action: See post, secs. 1582 et seq.

See the subject of negotiable instruments and the rights of parties thereto discussed in the Civil Code, secs. 3122 et seq.

Thing in action, defined: Civ. Code, sec. 953.

§ 369. An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.

Executors and administrators, action by, jointly with heirs or devisees, for possession of real estate or quieting title: Sec. 1452. Actions by, alone: Sec. 1581-3. To set aside fraudulent deeds made by deceased: Sec. 1589.

§ 370. When a married woman is a party, her husband must be joined with her, except:

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone;

2. When the action is between herself and her husband, she may sue or be sued alone;

3. When she is living separate and apart from her husband by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone. [Amendment approved March 24, 1874; Amendments 1873-4, p. 293. In effect July 1, 1874.]

Contracts of married women generally: See Civ. Code, sec. 158.

Sole traders: Sec. 1811 et seq.

§ 371. If a husband and wife be sued together the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also.

§ 372. When an infant, or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court, in which the action is pending in each case. A guardian ad litem may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him. [Amendment approved April 15, 1880; Amendments 1880, p. 63. In effect April 15, 1880.]

Appointment of guardian ad litem: See next section.

Guardian and ward, generally: See post, secs. 1747 et seq.; and Civ. Code, secs. 236 et seq.

Insane or incompetent person: Civil Code, secs. 36, 38-41; guardian of, secs. 1763-1766.

Minors and persons of unsound mind, their rights and liabilities: Civ. Code, secs. 33 et seq.

§ 373. When a guardian ad litem is appointed by the court, he must be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant;

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons, or if under that age, or if he neglect so to apply, then upon the application of a relative or friend of the infant, or of any other party to the action;

3. When an insane or incompetent person is party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding. [Amendment approved April 15, 1880; Amendments 1880, p. 63. In effect April 15, 1880.]

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§ 374. An unmarried female may prosecute, as plaintiff, in an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor.

Exemplary damages: See Civ. Code, sec. 3294.

§ 375. A father, or in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterward, and there be no loss of service.

Guardian ad litem: Sec. 372; appointment of, sec. 373.

§ 376. A father, or in case of his death or desertion of his family, the mother, may maintain an

action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed, by another person who is responsible for his conduct, also against such other person. [Amendment approved March 24, 1874; Amendments 1873-4, p. 294. In effect July 1, 1874.]

Guardian and ward: Secs. 1768-1776, and Civil Code, secs. 236-257.

§ 377. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just. [Amendment approved March 24, 1874; Amendments 1873-4, p. 224. In effect July 1st, 1874.]

§ 378. All persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this title.

Cotenants: Sec. 381.
Special partners: Civil Code, sec. 2492.
Other parties, bringing in: Sec. 389.
Misjoinder and nonjoinder of plaintiffs: See sec. 430.

§ 379. Any person may be made a defendant who has or claims an interest in the controversy

adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant.

Second sentence of section, added by Code.

Joining landlord: Civ. Code, sec. 1949.

Parties to foreclosure: Sec. 726.

Corporation stockholders: Const. Cal., art. 12, secs. 3, 4; Civ. Code, sec. 322.

Suits against the State: Const. Cal., art. 20; sec. 6.

Associates, suing by common name: Sec. 388.

Quieting title, suits: See sec. 738.

Executors, unqualified: Sec. 1587.

Fresh parties, bringing in: Sec. 389.

Service on one defendant out of several, effect of: Sec. 414.

State, suits against.—Suits may be brought against the State in such manner and in such courts as shall be directed by law: Const. Cal., art. 11, sec. 11.

Actions against State, statutes relating to: See post, Appendix, pp. 868-74, Stat.

§ 380. In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed. [Amendment approved March 24, 1874; Amendments 1873-4, p. 295. In effect July 1, 1874.]

As originally adopted, this section was compul-

sory, using the words "must be joined" in place of the words "may be joined," first introduced by the amendment of 1874.

Actions to quiet title: See post, sec. 738.
Writ of possession: See post, sec. 682.
Fresh parties, bringing in: See sec. 389.
Nonjoinder, misjoinder of parties: See sec. 430.

§ 381. Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same. [Amendment approved March 24, 1874; Amendments 1873-4, p. 295. In effect July 1, 1874.]

Cotenants may sever: See sec. 384, infra.
Ejectment: See sec. 426, post, and note, and sec. 379, supra.
Quieting title: See post, sec. 738.
Joint tenants: See secs. 374, 384.

§ 382. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Joinder, misjoinder, nonjoinder: Executors, etc., not qualified need not join: Sec. 1587.

§ 383. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff; and all or any of them join as plaintiffs in the same action, concerning or affecting the obligation or instrument upon which they are severally liable. [Approved February 23, 1897; Stats. 1897, c. 23.]

See secs. 414, 578, 579.

§ 384. All persons holding as tenants in common, joint tenants or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.

Coclaimants, uniting as plaintiffs: Sec. 381.

§ 385. An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding. [Amendment approved March 24, 1874; Amendments 1873-4, p. 295. In effect July 1, 1874.]

If a party die, judgment against his representative must be that he pay in due course of administration: Sec. 1504. Necessity for claiming against estate of deceased: Sec. 1493.

Death after verdict or decision and before judgment: See post, sec. 669.
Survival of actions: See post, secs. 1581 et seq.
Bringing in new parties: See sec. 389.

§ 386. A defendant against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order. And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another. [Amendment approved March 3, 1881; Stats. 1881, 19. In effect March 3, 1881.]

§ 387. Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is

permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint. [Amendment approved March 24, 1874; Amendments 1873-4, 296. In effect July 1, 1874.]

Eminent domain—intervention in, sec. 1246.

§ 388. When two or more persons, associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants, and had been sued upon their joint liability.

Business associates—common name, sec. 414.

Partners under fictitious name must file certificate: See Civ. Code, secs. 2466 et seq.

§ 389. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to

that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served. And when, in an action for the recovery of real or personal property, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment. [Approved February 16, 1897; Stats. 1897, c. 12.]

Joining landlord, sec. 379.
Party, adding and amending name of, sec. 473.

§ 390. Causes of action upon contract, or for damages arising out of, or pertaining or incident to, the official administration of the fire departments created by acts of the Legislature of this State, shall be brought directly by and against the municipality by its corporate name wherein the damage was sustained. And the said boards of fire commissioners shall not be sued as such, except to compel or restrain the performance of acts proper to be compelled or restrained under and not within the discretion intended to be conferred by this act. [New section approved March 12, 1885; Stats. 1885, 92.]

TITLE IV.

OF THE PLACE OF TRIAL OF CIVIL ACTIONS.

§ 392. Certain actions to be tried where the subject or some part thereof is situated.
§ 393. Other actions, where the cause or some part thereof arose.
§ 394. Place of trial of actions against counties.
§ 395. Other actions according to the residence of the parties.
§ 396. Action may be tried in any county, unless the defendant demand a trial in the proper county.
§ 397. Place of trial may be changed in certain cases.
§ 398. When judge is disqualified, cause to be transferred.
§ 399. Papers to be transmitted. Costs, etc. Jurisdiction, etc.
§ 400. Proceedings after judgment in certain cases transferred.

§ 392. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof is situated, subject to the power of the court to change the place of trial, as provided in this Code:

1. For the recovery of real property, or of an estate or interest therein, or for the determination, in any form of such right or interest, and for injuries to real property;

2. For partition of real property;

3. For the foreclosure of all liens and mortgages on real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action; provided, that in the case mentioned in this subdivision, if the plaintiff prays in his complaint for an injunction pending the action, or applies pending the action, for an injunction, the proper county for the trial shall be the county in which the defendant resides or a ma-

jority of the defendants reside at the commencement of the action. [Amendment approved March 19, 1889; Stats. 1889, 352. In effect March 19, 1889.]

Riot, actions for damages caused by, must be tried in the county in which the property injured is situated: Polit. Code, sec. 4453.

§ 393. Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

1. For the recovery of a penalty or forfeiture imposed by statute; except that, when it is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offense was committed;

2. Against a public officer, or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, does anything touching the duties of such officer.

§ 394. An action against a county or city and county may be commenced and tried in such county or city and county unless such action is brought by a county or city and county, in which case it may be commenced and tried in any county or city and county not a party thereto; provided further, that whenever an action is brought by a county or city against citizens of another county, or a corporation doing business in the latter, the action must be, on the motion of the defendant, transferred for trial to a county other than the plaintiff, if the plaintiff be a county, and other than that in which

the plaintiff is situated, if the plaintiff be a city. [Amendment approved March 10, 1891; Stats. 1891, 56. In effect immediately.]

§ 395. In all other cases, the action must tried in the county in which the defendants, or some of them reside at the commencement of the action; or, if none of the defendants reside in the State, or, if residing in this State, and the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if the defendant is about to depart from the State, such action may be tried in any county where either of the parties reside, or service is had; subject, however, to the power of the court to change the place of trial as provided in this Code.

Changing venue in criminal actions: See secs. 1033, 1034, Pen. Code.

§ 396. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county.

§ 397. The court may, on motion, change the place of trial in the following cases:

1. When the county designated in the complaint is not the proper county;

2. When there is reason to believe that an impartial trial cannot be had therein;

3. When the convenience of witnesses, and the ends of justice would be promoted by the change;

4. When from any cause the judge is disqualified from acting.

Appeal—from order as to change of venue, sec. 939, subd. 3.

Judge, when disqualified: See ante, sec. 170.

Mandamus and prohibition.—Controlling action of court on motion to change the place of trial by resort to these writs, see the note to the next section, and sections 1085, 1102, post.

§ 398. If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, or if, from any cause, the court orders the place of trial changed, it must be transferred for trial to a court the parties may agree upon, by stipulation in writing, or made in open court and entered in the minutes; or, if they do not so agree, then to the nearest or most accessible court, where the like objection or cause for making the order does not exist, as follows:

1. If in a Superior Court, to another Superior Court.

2. If in a Justice's Court, to another Justice's Court in the same county. [Approved March 27, 1897; Stats. 1897, c. 124. In effect immediately.]

§ 399. When an order is made transferring an action or proceeding for trial, the Clerk of the Court, or Justice of the Peace, must transmit the pleadings and papers therein to the Clerk or Justice of the Court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.

§ 400. When an action or proceeding affecting the title to or possession of real estate has been brought in or transferred to any court of a county other than the county in which the real estate, or

some portion of it, is situated, the Clerk of such court must, after final judgment therein, certify under his seal of office, and transmit to the corresponding court of the county in which the real estate affected by the action is situated, a copy of the judgment. The Clerk receiving such copy must file, docket, and record the judgment in the record of the court, briefly designating it as a judgment transferred from ——— court (naming the proper court).

TITLE V.

OF THE MANNER OF COMMENCING CIVIL ACTIONS.

§ 405. Actions, how commenced.
§ 406. Complaint, how indorsed. When summons may be issued, and how waived.
§ 407. Summons, how issued, directed, and what to contain.
§ 408. Alias summons.
§ 409. Notice of the pendency of an action affecting the title to real property.
§ 410. Summons, how served and returned.
§ 411. Summons, how served.
§ 412. Publication when defendant is absent from the State, concealed, or a foreign corporation having no agent, etc.
§ 413. Manner of publication and appointment of attorney.
§ 414. Proceedings where there are several defendants, and part only are served.
§ 415. Proof of service, how made.
§ 416. When jurisdiction of action acquired.

§ 405. Civil actions in the courts of this State are commenced by filing a complaint. [Amendment approved March 24, 1874; Amendments 1873-4, 296. In effect July 1, 1874.]

§ 406. The Clerk must indorse on the complaint the day, month, and year that it is filed; and at any time within one year thereafter, the plaintiff may have a summons issued; and if the action be brought against two or more defendants,

who reside in different counties, may have a summons issued for each of such counties at the same time. But at any time within the year after the complaint is filed, the defendant may, in writing, or by appearing and answering or demurring, waive the issuing of summons; or, if the action be brought upon a joint contract of two or more defendants, and one of them has appeared within the year, the other or others, may be served or appear after the year, at any time before trial. [Amendment approved March 24, 1874; Amendments 1873-4, 296. In effect July 1, 1874.]

Admission of service by defendant: Sec. 415.
Alias summons: Sec. 408.
Appearance: Secs. 416, 1014.

§ 407. The summons must be directed to the defendant, signed by the Clerk, and issued under the seal of the court, and must contain:

1. The names of the parties to the action, the court in which it is brought, and the county in which the complaint is filed;

2. A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within thirty days, if served elsewhere;

3. A notice that, unless the defendant so appears and answers, the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint. [Approved March 2, 1897; Stats. 1897, c. 58.]

Abbreviations, etc., sec. 186. Amendments, sec. 473.
Abbreviations and numerals: Sec. 186.
mendment: Sec. 473.

Clerk's duties, generally: Sec. 262.

Spanish language, proceedings in: Secs. 185, 1056.

Style of process.—The style of all process shall be: "The people of the State of California," and all prosecutions shall be conducted in their name and by their authority: Const. Cal., art. 6, sec. 18. The sovereignty of the State resides in the people thereof, and all writs and processes must issue in their name: Polit. Code, sec. 30.

§ 408. If the summons is returned without being served on any or all of the defendants, or if it has been lost, the Clerk, upon the demand of the plaintiff, may issue an alias summons, in the same form as the original; provided, that no such alias summons shall be issued after the expiration of one year from the date of the filing of the complaint. [Amendment approved March 8, 1887; Stats. 1887, 50. In effect March 8, 1887.]

§ 409. In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterward, may record in the office of the Recorder of the county in which the property is situated a notice of the pendency of the action, containing the names of the parties and the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names. [Amendment approved March 24, 1874; Amendments 1873-4, 297. In effect July 1, 1874.]

Partition—recording notice of suit, sec. 755.

Person in possession of real property, action against, cannot be prejudiced by any alienation made by him: Sec. 747.

§ 410. The summons may be served by the Sheriff of the county where the defendant is found or by any other person over the age of eighteen, not a party to the action. A copy of the complaint must be served with the summons, upon each of the defendants. When the summons is served by the Sheriff, it must be returned, with his certificate of its service, and of the service of any copy of the complaint, where such copy is served, to the office of the Clerk from which it issued. When it is served by any other person, it must be returned to the same place with an affidavit of such person of its service, and of the service of a copy of the complaint, where such copy is served. [Amendment approved March 23, 1893; Stats. 1893, 207.]

Costs, where served by person other than Sheriff: See post, Appendix, 790.

§ 411. The summons must be served by delivering a copy thereof, as follows:

1. If the suit is against a corporation formed under the laws of this State, to the president or other head of the corporation, secretary, cashier, or managing agent thereof;

2. If the suit is against a foreign corporation, or a nonresident joint stock company, or association, doing business and having a managing or business agent, cashier, or secretary within this State, to such agent, cashier, or secretary;

3. If against a minor under the age of fourteen years, residing within this State, to such minor, personally, and also to his father, mother, or guar-

dian; or, if there be none within this State, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed;

4. If against a person residing within this State, who has been judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such person and also to his guardian;

5. If against a county, city or town, to the president of the Board of Supervisors, president of the Council or trustees, or other head of the legislative department thereof;

6. In all other cases, to the defendant personally. [Amendment approved March 24, 1874; Amendments 1873-4, 298. In effect July 1, 1874.]

Association, service may be on one of the members of: Sec. 388.

Return of summons: Secs. 411, 415.

Spanish language, proceedings in: Secs. 185, 1056.

Telegraph, service by: Sec. 1017.

§ 412. Where the person on whom service is to be made resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier, or secretary within the State, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit, or by the complaint on file herein, that it is an action

which relates to or the subject of which is real or personal property in this State, in which such person defendant or foreign corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or foreign corporation from any interest therein, such court or judge may make an order that the service be made by the publication of the summons. [Amendment approverd March 23, 1893; Stats. 1893, 285. In effect immediately.]

§ 413. The order must direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the State, or absent therefrom, must not be less than two months. In case of publication, where the residence of a nonresident or absent defendant is known, the court or judge must direct a copy of the summons and complaint to be forthwith deposited in the postoffice, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the postoffice, and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication. [Amendment approved March 24, 1874; Amendments 1873-4, 299. In effect July 1, 1874.]

Liens, mechanics, etc., publication under: Sec. 1191.

Publication, proof of: Secs. 2010, 2011.

Judgment by default: Sec. 585, subd. 3.

§ 414. When the action is against two or more defendants, jointly or severally liable on a contract, and the summons is served on one or more but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.

Joining persons severally liable upon instruments: Sec. 383.

Judgment against some defendants, proceedings continuing against the others: Sec. 579.

Joint debtors, proceedings against, after judgment against some: Sec. 989.

§ 415. Proof of the service of summons and complaint must be as follows:

1. If served by the Sheriff, his certificate thereof;

2. If by any other person, his affidavit thereof; or,

3. In case of publication, the affidavit of the printer, or his foreman or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons in the postoffice, if the same has been deposited; or,

4. The written admission of the defendant in case of service otherwise than by publication; the certificate or affidavit must state the time and place of service.

Time and place: See secs. 416, post.

§ 416. From the time of the service of the summons and of a copy of the complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. The voluntary appearance of a de-

fendant is equivalent to personal service of the summons and copy of the complaint upon him. [Amendment approved March 24, 1874; Amendments 1873-4, 299. In effect July 1, 1874.]

An act concerning service of summons upon absent defendants by publication, approved March 15, 1872, is repealed. [In effect March 20, 1874.]

Admission of service: Sec. 415.

Appearance: Sec. 1014.

Waiver of summons: Sec. 406.

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TITLE VI.

OF THE PLEADINGS IN CIVIL ACTIONS.

Chapter I. The pleadings in general.
II. The complaint.
III. Demurrer to the complaint.
IV. The answer.
V. Demurrer to answer.
VI. Verification of pleadings.
VII. General rules of pleading.
VIII. Variance—Mistakes in pleadings and amendments.

CHAPTER I.

THE PLEADINGS IN GENERAL.

§ 420. Definition of pleadings.
§ 421. This Code prescribes the form and rules of pleadings.
§ 422. What pleadings are allowed.

§ 420. The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.

§ 421. The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this Code.

One form of actions: Sec. 307.

§ 422. The only pleadings allowed on the part of the plaintiff are:

1. The complaint;
2. The demurrer to the answer.

And on the part of the defendant:

1. The demurrer to the complaint;
2. The answer.

CHAPTER II.

THE COMPLAINT.

§ 425. Complaint, first pleading.
§ 426. Complaint, what to contain.
§ 427. What causes of action may be joined.

§ 425. The first pleading on the part of the plaintiff is the complaint.

§ 426. The complaint must contain:

1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action;
2. A statement of the facts constituting the cause of action, in ordinary and concise language;
3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated.

Title, papers defectively entitled: Sec. 1046.

Venue: Secs. 392-400.

Parties: Secs. 367-389.

Association may be sued under common name: Sec. 388.

Fictitious names for defendants: Sec. 474.

Abbreviations and numerals: Sec. 186.

Construction of pleadings to be liberal: Sec. 452.

Errors and defects to be disregarded: Sec. 475.

Material allegations not controverted taken as true: Sec. 462.

Proceedings in Spanish language: Secs. 185, 1056.

Service of complaint: Sec. 410.

Several causes of action, uniting: Sec. 427.

Pleading, in particular cases—Account. Items of, need not be set out in complaint: Sec. 454; Suit for: See secs. 1493-8, post.

Amendment of pleadings: Secs. 472, 473; of complaint: Sec. 432.

Claim and delivery: See sec. 509, post.

Cloud on title, action to remove: Secs. 738, 1050.

As to effect of setting out written instrument, if its genuineness is not denied on oath: Secs. 447-449.

Conditions precedent, mode of averring performance of: Sec. 457.

Variance between name of corporation sued and corporation making contract: Sec. 471.

Death, suggestion of: Sec. 385.

As to the necessity of demanding a deed: See sec. 457.

Detainer, unlawful: Secs. 1159-1179. Complaint in: Sec. 1166.

Detinue: See "Replevin," infra.

Disability, suggestion of: Sec. 385.

Divorce: See Civ. Code, secs. 90 et seq.

Nuisance: Sec. 731, post.

Parent, action for the injury or death of minor child: Secs. 376, 377.

Partition: Secs. 752, 753.

Partnership.—Persons doing business as partners contrary to the provisions of the Civil Code,

division 3, part 4, title 10, chapter 2, article 7—i. e., Civil Code, sections 2466-2471—cannot maintain any action upon or on account of any contracts made or transactions had in their partnership name, in any courts of this State, until they have first filed the certificate, and made the publication therein required: Civil Code, sec. 2468.

"Partnership": See Civil Code, secs. 2395 et seq., for the general provisions on the subject.

Quiet title to real estate, action to: Sec. 738. To money or obligation: Sec. 1050.

Replevin: See post, sec 509.

Seduction, unmarried female may prosecute action for her own: Sec. 374. Father, or in certain cases mother, may prosecute: Sec. 375. Guardian may prosecute: Sec. 375.

Misjoinder, nonjoinder, etc.: Sec. 430.

Ejectment, order for party to make survey of property in dispute: Secs. 742, 743.

Executor: See "Administrator," "Ejectment," supra.

Forcible entry, etc.: Secs. 1159-1179.

Gold coin, allegations to obtain judgment in: Sec. 667.

Goods sold, etc.—Liquors.—By chapter 314, approved March 20, 1874, Stats. 1874, p. 509, the purchase of or sale and delivery of any spirituous or malt liquors, wine, or cider, by retail or by the drink, is declared to be an invalid consideration for any promise to pay, or assumpsit of account therefor, when the amount of such account or demand exceeds five dollars; and no court in any action at law is to render judgment for a greater amount than five dollars for the sale at retail, or by the drink, of any spirituous or malt liquors, wine, or cider, together with costs; but nothing in that act is to be construed to affect in any manner debts contracted prior to its passage.

Guardian, action by, for injury or death of ward: Secs. 376, 377. Waste by: Sec. 732.

Heirs or representatives, action by, for death of a person: Sec. 377.

Husband and wife: Secs. 370, 371.

Intervention: Sec. 387.

Limitations, statute of: Secs. 312-363. How pleaded: Sec. 458.

Sheriff: Action may be maintained against sheriff for any money come to his hands, with twenty-five per cent damages, and ten per cent per month interest, if he does not pay over same on demand to person entitled thereto: Polit. Code, sec. 4181; also for two hundred dollars and all damages sustained by party aggrieved if Sheriff do not return notice or process with the necessary indorsements without delay: Id., sec. 4179; also for neglecting or refusing to sell upon execution: Id., sec. 4180. Action against Sheriff for escape or rescue: Id., secs. 4182, 4183.

Slander.—Extrinsic facts need not be stated: Sec. 460.

Statute, private, how pleaded: See sec. 459.

Stock.—Action to recover stock sold for delinquent assessment: Sec. 341, and note.

Supplemental complaint: Sec. 464.

Surety, action by, to compel principal to satisfy debt: Sec. 1050.

Tenants, waste by: Sec. 732.

Tenants in common, waste by: Sec. 237.

Timber, cutting down or injuring: See sec. 733.

Trusts, enforcement of: See Civ. Code, secs. 2215 et seq.

Usage of trade: See post, sec. 1870, subd. 12; and Civ. Code, sec. 1644.

Variance: See post, secs. 469-471.

Vendor's lien: See Civ. Code, sec. 3046.

Verification of pleadings: Sec. 446.

Vessels, steamers, and boats, actions against: Sec. 813.

Waste, reference to: Sec. 732.

Forfeiture.—Whenever by the terms of an obligation a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty: Civ. Code, sec. 3275. Relief of a tenant from forfeiture of a lease: Sec. 1179.

Liquidated damages.—Every contract by which the amount of damage to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof is to that extent void, except as expressly provided in the next section: Civ. Code, sec. 1670. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage: Civ. Code, sec. 1671.

Damages, persons suffering detriment may recover reasonable.—Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages: Civ. Code, sec. 3281. Damages must in all cases be reasonable; and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered: Id., sec. 3359.

Damages on revoking submission: Sec. 1290.—Damages are exclusive of exemplary damages and interest, except where those are expressly men-

tioned: Civ. Code, sec. 3357. No person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on exemplary damages and penal damages, and in the Civil Code, secs. 3319, 3339, and 3340: Civ. Code, sec. 3358.

Nominal damages.—When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages: Civ. Code, sec. 3360.

Remoteness.—As to remoteness, Civ. Code, sec. 3301, infra.

Detriment, definition of.—Detriment is a loss or harm suffered in person or property: Civ. Code, sec. 3282.

Prospective damages.—Damages may be awarded in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future: Civ. Code, sec. 3283.

Peculiar value, property of.—Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer: Civ. Code, sec. 3355.

Writing, value of.—For the purpose of estimating damages the value of an instrument in writing is presumed to be equal to that of the property to which it entitles its owner: Civ. Code, sec. 3356.

Interest on legacy, see Civil Code, section 1369, As to what is the legal rate: Civ. Code, sec. 1917. In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury: Civ. Code, sec. 3288.

Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation: Civ. Code, sec. 3289. Accepting payment of the whole principal as such waives all claim to interest: Civ. Code, sec. 3290. Whenever a loan of money is made, it is presumed to be made upon interest, unless it is otherwise stipulated at the time, in writing: Civ. Code, sec. 1914; see also Id. 1917. Interest is the compensation allowed by law, or fixed by the parties, for the use, or forbearance, or detention of money: Civ. Code, sec. 1915. When a rate of interest is prescribed by a law or contract, without specifying the period of time by which such rate is to be calculated, it is to be deemed an annual rate: Civ. Code, sec. 1916. Interest, agreement for: See Civ. Code, sec. 1917.

Damages on deposit, measure of.—A depositor must indemnify the depositary: 1. For all damage caused to him by the defects or vices of the thing deposited; and, 2. For all expenses necessarily incurred by him about the thing, other than such as are involved in the nature of the undertaking: Civ. Code, sec. 1833.

Insurance: See Civ. Code, secs. 25, 27.

Death, damages for occasioning: See sec. 377, ante.

Current money, borrower to pay in.—A borrower of money, unless there is an express contract to the contrary, must pay the amount due in such money as is current at the time when the loan becomes due, whether such money is worth more or less than the actual money lent: Civ. Code, sec. 1913. See sec. 667, post.

Foreign bills of exchange, damages or dishonor of.—For the dishonor of foreign bills of exchange,

the damages are prescribed by sections 3235, 3237, and 3238 of the Civil Code.

Real estate, covenants, damages for breach of.—The detriment caused by the breach of a covenant of "seisin," of "right to convey," of "warranty," or of "quiet enjoyment," in a grant of an estate in real property, is deemed to be: 1. The price paid to the grantor; or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property; 2. Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding five years; 3. Any expenses properly incurred by the covenantee in defending his possession: Civ. Code, sec. 3304.

Real estate, damages for not conveying.—The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid and expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land: Civ. Code, sec. 3306.

Real estate, damages for not accepting.—The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him: Civ. Code, sec. 3307.

Goods, damages on breach of warranty of title to.—The detriment caused by the breach of a warranty of the title of personal property sold is deemed to be the value thereof to the buyer when he is

deprived of its possession, together with any costs which he has become liable to pay in an action brought for the property by the true owner: Civ. Code, sec. 3312.

Goods, damages on breach of warranty of quality of.—The detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time: Civ. Code, sec. 3313.

The detriment caused by the breach of a warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which is defined by the last section, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose: Civ. Code, sec. 3314.

Carrier, damages for omitting to carry.—The detriment caused by the breach of a carrier's obligation to accept freight, messages, or passengers, is deemed to be the difference between the amount which he had a right to charge for the carriage and the amount which it would be necessary to pay for the same service when it ought to be performed: Civ. Code, sec. 3315.

Carrier, damages for not delivering freight: Civ. Code, sec. 3316.

Carrier, damages for delay: Civ. Code, sec. 3317.

Agent, damages for breach of warranty of authority of: See Civ. Code, sec. 3318.

Marriage, damages for breach of promise of.—The damages for the breach of a promise of marriage rest in the sound discretion of the jury: Civ. Code, sec. 3319.

Deposit.—The liability of a depositary for negligence cannot exceed the amount which he is in-

formed by the depositor, or has reason to suppose, the thing deposited to be worth: Civ. Code, sec. 1840.

Libel or slander, damages on.—In actions for libel or slander defendant may justify and allege mitigating circumstances, and whether he prove justification or not, he may give in evidence the mitigating circumstances: Sec. 461.

Mesne profits.—The detriment caused by the wrongful occupation of real property in cases not embraced in sections 3335, 3344, and 3345 of this Code (Civil Code), or section 1174 of the Code of Civil Procedure, is deemed to be the value of the use of the property for the time of such occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, and the costs, if any, of recovering the possession: Civ. Code, sec. 3334.

Ejectment, damages on: Sec. 427. Where plaintiff's right terminates during pendency of action, plaintiff may recover damages for withholding the property: Sec. 740. Defendant may set off value of improvements where made under color of title: Sec. 741.

Holding over real property, damages for.—For willfully holding over real property, by a person who entered upon the same as guardian or trustee for an infant, or by right of an estate terminable with any life or lives, after the termination of the trust or particular estate, without the consent of the party immediately entitled after such termination, the measure of the damages is the value of the profits received during such holding over: Civ. Code, sec. 3335.

Conversion of goods, damages for.—The detriment caused by the wrongful conversion of personal property is presumed to be: 1. The value of

the property at the time of the conversion, with the interest from that time; and 2. A fair compensation for the time and money properly expended in pursuit of the property: Civ. Code, sec. 3336.

Seduction.—The damages for seduction rest in the sound discretion of the jury: Civ. Code, sec. 3339. An unmarried woman may prosecute as plaintiff an action for her own seduction, and may recover pecuniary or exemplary damages: Sec. 374.

Animals, injuries to: See Civ. Code, sec. 3340.

Penal damages.—Waste by guardians, tenants for life or years, joint tenants, or tenants in common: Sec. 731, post. Wasting or embezzling estate of deceased: Secs. 1458-1460. Executor fraudulently selling real property: Sec. 1572.

Holding over.—Damages for forcible entry and detainer: See sec. 1174. Forcible or unlawful entry upon or detention of any building or cultivated real property: Sec. 735; see also as to forcible entry, or forcible or unlawful detainer, sec. 1174. If any tenant give notice of his intention to quit the premises, and does not deliver up the possession at the time specified in the notice, he must pay to the landlord treble rent during the time he continues in possession after such notice: Civ. Code, sec. 3344. If any tenant, or any person in collusion with the tenant, holds over any lands or tenements after demand made and one month's notice, in writing given, requiring the possession thereof, such person holding over must pay to the landlord treble rent during the time he continues in possession after such notice: Civ. Code, sec. 3345.

For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times

such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which case the damages are a sum equal to the actual detriment: Civ. Code, sec. 3346. For cutting down or carrying off wood, underwood, trees, or timber, or girdling or otherwise injuring trees or timber, on the land of another person, or on the street or highway in front of any person's house, village or city lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof: Sec. 733. The wording of section 733 more resembles the wording of sections 735 and 1174, the sections as to forcible entry, etc., than that as to waste, section 732.

Dueling.—If any person slays or permanently disables another person in a duel in this State, the slayer must provide for the maintenance of the widow or wife of the person slain or permanently disabled, and for the minor children, in such manner and at such cost, either by aggregate compensation in damages to each, or by a monthly, quarterly, or annual allowance, to be determined by the court: Civ. Code, sec. 3347. If any person slays or permanently disables another person in a duel in this State, the slayer is liable for and must pay all debts of the person slain or permanently disabled: Id., sec. 3348.

Specific and preventive relief.—Specific or preventive relief may be given in cases specified in the Civil Code, sections 3366-3423 and in no others.

§ 427. The plaintiff may unite several causes of action in the same complaint, where they all arise out of:

1. Contracts, express or implied;
2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same;
3. Claims to recover specific personal property, with or without damages for the withholding thereof;
4. Claims against a trustee by virtue of a contract or by operation of law;
5. Injuries to character;
6. Injuries to person;
7. Injuries to property.

The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person.

Replevin: See post, sec. 509.

CHAPTER III.

DEMURRER TO THE COMPLAINT.

§ 430. When defendant may demur.
§ 431. Demurrer must specify, etc. May be taken to part. May answer and demur at same time.
§ 432. What proceedings are to be had when complaint amended.
§ 433. Objection not appearing on complaint, may be taken by answer.
§ 434. Objections, when deemed waived.

§ 430. The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties for the same cause; or,

4. That there is a defect or misjoinder of parties plaintiff or defendant; or,

5. That several causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action; or,

7. That the complaint is ambiguous, unintelligible, or uncertain.

General and special demurrer: See sec. 431, infra.

Demurring and answering at same time: See secs. 431, 441.

Serving demurrer: See sec. 465.

Judgment on demurrer: Sec. 636.

Demurrer is an appearance: See sec. 1014, post.

Waiving objections by not demurring: Sec. 434.

Joinder of plaintiffs: Secs. 378, 381. Tenants in common, etc.: Sec. 381. Necessary party refusing to join as plaintiff may be made a defendant: Sec. 382.

General and special demurrer: See sec. 431, infra.

§ 431. The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so, it may be disregarded. It may be taken to the whole complaint or to any of the causes of action stated therein, or the defendant may demur and answer at the same time.

§ 432. If the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint, as amended, to be filed, and a copy of the amendments, or amended complaint, must be served upon the defendants affected thereby. The defendant must answer the amendment or the complaint, as amended, within ten days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases. [Amendment approved March 9, 1880; Amendments 1880, 2. In effect March 9, 1880.]

Amendment—generally, secs. 472, 473.

§ 433. When any of the matters enumerated in section 430 do not appear upon the face of the complaint, the objection may be taken by answer.

§ 434. If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

CHAPTER IV.

THE ANSWER.

§ 437. Answer, what to contain.
§ 438. When counterclaim may be set up.
§ 439. When defendant omits to set up counterclaim.
§ 440. Counterclaim not barred by death or assignment.
§ 441. Answer may contain several grounds of defense. Defendant may answer part and demur to part of complaint.
§ 442. Cross-complaint.

§ 437. The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant;

2. A statement of any new matter constituting a defense or counter-claim. If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint. [Amendment approved March 24, 1874; Amendments 1873-4, 300. In effect July 1, 1874.]

Pleas in abatement: See ante, sec. 430.
Answer in particular cases: See sec. 426.
Account demanding items of: Sec. 454.
Amendment: Secs. 472, 473.
Appearance, answering is: Sec. 1014.
Assignment of chose in action: Sec. 368.

Claim and delivery.—Defendant may claim a return of the property: Sec. 667.

Conditions precedent in contract, pleading performance of: Sec. 457.

Counter-claim: Secs. 438-441.

Cross-complaint: Sec. 442.

Death of party: Sec. 385.

Disability of party: Sec. 385.

Disclaimer: See sec. 739, post.

Ejectment.—Defendant may set off against damages value of improvements made under color of title: Sec. 741.

Errors and defects to be disregarded: Sec. 475.

Estoppel: Sec. 1908.

Gold coin, etc., allegations as to money being payable in, should be denied: Sec. 667.

Husband and wife: Secs. 370, 371.

Judgment or other determination of a court, officer, or board, pleading: Secs. 456, 1908.

Libel.—Defendant may justify and allege mitigating circumstances: Sec. 461.

Mortgage: Sec. 726.

Quiet title, action to.—Defendant may disclaim: Sec. 739.

Slander: Sec. 461.

Statute, private.—Pleading: Sec. 459.

Striking out: Sec. 453.

Supplemental answer: Sec. 464.

Time to answer.—Extension of: Sec. 1054.

Writing.—Setting forth an answer, effect of: Secs. 448, 449.

§ 438. The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. In an action arising upon contract; any other cause of action arising also upon contract, and existing at the commencement of the action.

Dismissing action where counter-claim: Sec. 581.

Omission to set up counter-claim prevents future action thereon: Sec. 439.

Compensated, cross-demands deemed: Sec. 441.

§ 439. If the defendant omit to set up a counter-claim in the cases mentioned in the first subdivision of the last section, neither he nor his assignee can afterward maintain an action against the plaintiff therefor.

§ 440. When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counter-claim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other. [Amendment approved March 24, 1874; Amendments 1873-4, 300. In effect July 1, 1874.]

§ 441. The defendant may set forth by answer as many defenses and counter-claims as he may have. They must be separately stated, and the several defenses must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint, and demur to the residue.

§ 442. Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint. [New section approved March 24, 1874; Amendments 1873-4, 301. In effect July 1, 1874.]

Answer to cross-complaint: See secs. 437-441.

Original complaint: Secs. 426, 427.

Dismissing action, where counter-claim: Sec. 581.

CHAPTER V.

DEMURRER TO ANSWER.

§ 443. When plaintiff may demur to answer.
§ 444. Grounds of demurrer.

§ 443. The plaintiff may, within the same length of time after service of the answer as the defendant is allowed to answer after service of summons, demur to the answer of the defendant, or to one or more of the several defenses or counter-claims set up in the answer. [Amendment approved March 24, 1874; Amendments 1873-4, 301. In effect July 1, 1874.]

Demurrer to complaint: Sec. 430.

Service of demurrer: Sec. 465.

Time to demur, extending: Sec. 1054.

Time to answer when demurrer overruled begins to run from service of notice of decision: Sec. 476.

§ 444. The demurrer may be taken upon one or more of the following grounds:

1. That several causes of counter-claim have been improperly joined;

2. That the answer does not state facts sufficient to constitute a defense or counter-claim;

3. That the answer is ambiguous, unintelligible, or uncertain.

Grounds of demurrer: See sec. 430.

CHAPTER VI.

VERIFICATION OF PLEADINGS.

§ 446. Verification of pleadings.
§ 447. Copy of written instrument contained in complaint admitted, unless answer is verified.
§ 448. When defense is founded on written instrument set out in answer, its execution admitted, unless denied by plaintiff, under oath.
§ 449. Exceptions to rules prescribed by two preceding sections.

§ 446. Every pleading must be subscribed by the party or his attorney; and when the complaint is verified, or when the State, or any officer of the State, in his official capacity, is plaintiff, the answer must be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or, unless an officer of the State, in his official capacity, is defendant. In all cases of a verification of a pleading, the affidavit of the party must state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; and where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county, where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is

verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties. When a corporation is a party, the verification may be made by any officer thereof.

Attorneys' power to bind client: Sec. 283.

Verifying accusation for disbarring attorney: See sec. 291, ante.

§ 447. When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified.

§ 448. When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant. [Amendment approved March 24, 1874; Amendments 1873-4, 301. In effect July 1, 1874.]

§ 449. But the execution of the instrument mentioned in the two preceding sections is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is, upon demand, refused an inspection of the original. Such demand must be in writing, served by copy, upon the adverse party or his attorney, and filed with the papers in the case. [Amendment approved April 16, 1880; Amendments 1880, 111. In effect April 16, 1880.]

Inspection of writings, order for: Sec. 1000.

CHAPTER VII.

GENERAL RULES OF PLEADING.

§ 452. Pleadings to be liberally construed.
§ 453. Sham and irrelevant answers, etc., may be stricken out.
§ 454. How to state an account in pleadings.
§ 455. Description of real property in a pleading.
§ 456. Judgments, how pleaded.
§ 457. Conditions precedent, how to be pleaded.
§ 458. Statute of Limitations, how pleaded.
§ 459. Private statutes, how pleaded.
§ 460. Libel and slander, how stated in complaint. Not necessary to allege or prove special damages.
§ 461. Answer in such cases.
§ 462. Allegation not denied, when to be deemed true. When to be deemed controverted.
§ 463. A material allegation defined.
§ 464. Supplemental complaint and answer.
§ 465. Pleadings subsequent to complaint must be filed and served.

§ 452. In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

§ 453. Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose.

§ 454. It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general or is defective in any particular. [Amendment approved March 9, 1880; Amendments 1880, 2. In effect March 9, 1880.]

§ 455. In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer upon execution to identify it.

§ 456. In pleading a judgment, or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction.

Judgment as an estoppel: See post, sec. 1908.

§ 457. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegations be controverted, the party pleading must establish, on the trial, the facts showing such performance.

Conditions precedent, interpretation of: See Civ. Code, secs. 1437 et seq.

§ 458. In pleading the Statute of Limitations, it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section —— (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred.

§ 459. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage.

§ 460. In an action for libel or slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish, on the trial, that it was so published or spoken.

§ 461. In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

See Civ. Code, secs. 45 et seq.

§ 462. Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party.

Cross-complaint must be replied to: See ante, secs. 442, 438.

Answer: See, generally, ante, sec. 437.

§ 463. A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

Immaterial allegations need not be answered: See sec. 462.

§ 464. The plaintiff and defendant, respective-

ly, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer.

Amending to pleadings: See sec. 472.

§ 465. All pleadings subsequent to the complaint must be filed with the clerk, and copies thereof served upon the adverse party or his attorney. [Amendment approved March 24, 1874; Amendments 1873-4, 401. In effect July 1, 1874.]

Service of papers: Sec. 1011 et seq.

Amendment pleadings, service of: See secs. 472, 432.

Extending time to serve papers: See post, sec. 1054.

CHAPTER VIII.

VARIANCE—MISTAKES IN PLEADINGS AND AMENDMENTS.

§ 469. Material variances, how provided for.
§ 470. Immaterial variance, how provided for.
§ 471. What not to be deemed a variance.
§ 472. Amendments of course, and effect of demurrer.
§ 473. Amendments by the court. Enlarging time to plead and relieving from judgments, etc.
§ 474. Suing a party by a fictitious name, when allowed.
§ 475. No error or defect to be regarded unless it affects substantial rights.
§ 476. Time to amend or answer, running of.

§ 469. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleadings to be amended, upon such terms as may be just. [Amendment approved March 24, 1874; Amendments 1873-4, 302. In effect July 1, 1874.]

Immaterial variance: Sec. 470.
Variance, fatal: Sec. 471.
Immaterial errors, generally: See post, sec. 475.

§ 470. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

Variance, material: Sec. 469; fatal: Sec. 471.

§ 471. Where, however, the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof.

Proof, generally: Secs. 1824, 1869.
Proof, failure of—dismissal for: Sec. 581, subd. 5.

§ 472. Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended, and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading. A demurrer is not waived by filing an answer at the same time; and when the demurrer to a complaint is overruled, and there is no answer filed, the court may, upon such terms as may be just allow an answer, to be filed. If a demurrer to the answer be overruled, the facts alleged in the answer must be considered as denied to the extent mentioned in section 462. [Amendment approved March 24, 1874; Amendments 1873-4, 302. In effect July 1, 1874.]

Complaint, amended—filing: Sec. 432.

Answer no waiver of demurrer: See sec. 431, ante.

Fictitious party: See, generally, sec. 474, post.

§ 473. The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this Code; and may, also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action. When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking, is sued for taking the same, the officer or sureties may in their answer set up the true value of the property, and that the person

in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made, or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit, and give judgment according to the right of possession of said property at the time the affidavit was made. [Amendment approved March 9, 1880; Amendments 1880, 2. In effect March 9, 1880.]

See sec. 585, post.

§ 474. When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly.

§ 475. The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown. [Approved February 26, 1897; Stats. 1897, c. 47. In effect immediately.]

§ 476. When a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order. [Amendment, approved March 24, 1874; Amendments 1873-4, 304. In effect July 1, 1874.]

Time to answer: Secs. 432, 472, 473.

Notice, service of: Sec. 1010 et seq.

TITLE VII.

OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

Chapter I. Arrest and Bail.
II. Claim and Delivery of Personal Property.
III. Injunction.
IV. Attachment.
V. Receivers.
VI. Deposit in Court.

CHAPTER I.

ARREST AND BAIL.

§ 478. No person to be arrested except as prescribed by this Code.
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§ 496. Allowance of bail.
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§ 500. Money deposited, how applied or disposed of.
§ 501. Sheriff, when liable as bail, and his discharge from liability.
§ 502. Proceedings on judgment against sheriff.
§ 503. Motion to vacate order of arrest or reduce bail. Affidavits on motion.
§ 504. When the order vacated or bail reduced.

§ 478. No person can be arrested in a civil action, except as prescribed in this Code.

Exemption from arrest—Constitutional provisions.—Imprisonment for debt, except for fraud, and in civil actions for torts, except in cases of willful injury to person or property, abolished: Art. 1, sec. 15. Members of legislature exempted from arrest: Art. 4, sec. 11. Electors are privileged on election day while in attendance at an election: Art. 2, sec. 2. No person to be imprisoned for a militia fine in time of peace: Art. 1, sec. 15.

Code provisions.—Electors are privileged from arrest on election days, being the same in effect as the constitutional provision above: Pol. Code, sec. 1069. Persons belonging to the military forces, while in atendance for military duty, are also exempt from arrest on civil process: Pol. Code, sec. 2021. Females privileged from arrest in civil actions, at least in justices' courts: Code Civ. Proc., sec. 861. Witnesses are likewise privileged: Id., sec. 2067.

§ 479. The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the State with intent to defraud his creditors;

2. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public

officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; or for misconduct or neglect in office, or in a professional employment, or for a willful violation of duty;

3. In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, to prevent its being found or taken by the sheriff;

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought;

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors. [Amendment, approved March 24, 1874; Amendments 1873-4, 304. In effect July 1, 1874.]

§ 480. An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought. [Amendment, approved March 9, 1880; Amendments 1880, 3. In effect March 9, 1880.]

§ 481. The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section four hundred and seventy-nine. The affidavit must be either positive or upon information and belief, and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit must be

filed with the clerk of the court. [Amendment, approved March 24, 1874; Amendments 1873-4, 305. In effect July 1, 1874.]

§ 482. Before making the order, the judge must require a written undertaking on the part of the plaintiff, with sureties in an amount to be fixed by the judge, which must be at least five hundred dollars, to the effect that the plaintiff will pay all costs which may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking. The undertaking must be filed with the clerk of the court. [Amendment, approved March 24, 1874; Amendments 1873-4, 305. In effect July 1, 1874.]

Undertakings, generally: See sec. 1057. Effect of: See sec. 941. Court commissioner's power to take: Sec. 259, ante.

On dismissing action, undertaking, when to be delivered to plaintiff: Sec. 581.

§ 483. The order may be made at the time of the issuing of the summons, or any time afterward before judgment. It must require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned, to the clerk of the court in which the action is pending.

§ 484. The order of arrest, with a copy of the affidavit upon which it is made, must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy of the affidavit, and also, if desired, a copy of the order of arrest.

Sheriff's duties.—To excuse omission by sheriff, direction by party or attorney must be in writing: Pol. Code, sec. 4185.

§ 485. The sheriff must execute the order by arresting the defendant and keeping him in custody until discharged by law.

Production of process upon request: Pol. Code, sec. 4188.

§ 486. The defendant, at any time before execution, must be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest.

§ 487. The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, to the effect that they are bound in the amount mentioned in the order of arrest, that the defendant will at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein, or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

Bail—Qualifications of: Secs. 494, 1057.

§ 488. At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration; or he may surrender himself to the sheriff of the county where he was arrested.

§ 489. For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest, or, by a written authority indorsed on a certified copy of the undertaking, may empower the sheriff to do

so. Upon the arrest of defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail are exonerated, if such arrest, delivery, or surrender take place before the expiration of ten days after judgment; but if such arrest, delivery, or surrender be not made within ten days after judgment, the bail are finally charged on their undertaking, and bound to pay the amount of the judgment within ten days thereafter.

§ 490. If the bail neglect or refuse to pay the judgment within ten days after they are finally charged, an action may be commenced against such bail for the amount of the original judgment.

§ 491. The bail are exonerated by the death of the defendant, or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process.

§ 492. Within the time limited for that purpose, the sheriff must file the order of arrest in the office of the clerk of the court in which the action is pending, with his return indorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he must retain in his possession until filed, as herein provided. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted them, and the sheriff is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court.

§ 493. Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail (specifying the places of

residence and occupations of the latter), before a judge of the court, or county clerk, at a specified time and place; the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given, there must be a new undertaking. [Amendment, approved March 9, 1880; Amendments 1880, 3. In effect March 9, 1880.]

Justification of bail: See sec. 495, infra.

§ 494. The qualifications of bail are as follows:

1. Each of them must be a resident and householder, or freeholder, within the State.

2. Each must be worth the amount specified in the order of the arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge or county clerk, on justification, may allow more than two sureties to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail. [Amendment, approved March 24, 1874; Amendments 1873-4, 306. In effect July 1, 1874.]

Qualifications—of bail: Sec. 1057, post.
Exemptions from execution: See sec. 690, post.

§ 495. For the purpose of justification, each of the bail must attend before the judge or county clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk, in his discretion, may think proper. The examination must be reduced to writing, and subscribed by the bail, if required by the plaintiff.

Justification: Sec. 259, subd. 3.

§ 496. If the judge or clerk find the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the sheriff is thereupon exonerated from liability.

Court commissioners—power as to bail, sec. 259, subd. 3.

§ 497. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of the bail be reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case, the sheriff must give the defendant a certificate of the deposit made, and the defendant must be discharged from custody.

Deposit in court: Secs. 572-574, 2104.

§ 498. The sheriff must, immediately after the deposit, pay the same into court, and take from the clerk receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff's attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.

Sheriff—penalty for nonpayment: Pol. Code, sec. 4181.

§ 499. If money is deposited, as provided in the two last sections, bail may be given, and may justify upon notice, at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited must be refunded to the defendant.

§ 500. Where money has been deposited, if it remain on deposit at the time of the recovery of a judgment in favor of the plaintiff, the clerk must, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment, refund the surplus, if any, to the defendant. If the judgment is in favor of the defendant, the clerk must, under like direction of the court, refund to him the whole sum deposited and remaining unapplied.

§ 501. If, after being arrested, the defendant escape or is rescued, the sheriff is liable as bail; but he may discharge himself from such liability by the giving bail at any time before judgment.

§ 502. If a judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned unsatisfied in whole or in part, the same proceedings may be had on his official bond for the recovery of the whole or any deficiency, as in other cases of delinquency.

§ 503. A defendant arrested may, at any time before the trial of the action, or if there be no trial, before the entry of judgment, apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiffs may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made. [Amendment, approved March 24, 1874; Amendments 1873-4, 306. In effect July 1, 1874.]

§ 504. If, upon such application, it apears that there was not sufficient cause for the arrest, the

order must be vacated; or if it appears that the bail was fixed too high, the amount must be reduced.

CHAPTER II.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 509. Delivery of personal property, when it may be claimed.
§ 510. Affidavit and its requisites.
§ 511. Requisition to sheriff to take and deliver the property.
§ 512. Security on the part of the plaintiff and proceedings in serving the order.
§ 513. Exception to sureties and proceedings thereon, or on failure to except.
§ 514. Defendant, when entitled to redelivery.
§ 515. Justification of defendant's sureties.
§ 516. Qualification of sureties.
§ 517. Property, how taken, when concealed in building or inclosure.
§ 518. Property, how kept.
§ 519. Claim of property by third person.
§ 520. Notice and affidavit, when and where to be filed.
§ 521. Actions on undertaking.

§ 509. The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer claim the delivery of such property to him, as provided in this chapter.

Judgment: See secs. 627, 667, post.

Verdict in actions for recovery of specific personalty: Sec. 627.

§ 510. Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing:

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is entitled to the possession thereof;

2. That the property is wrongfully detained by the defendant;

3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;

4. That it has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure.

5. The actual value of the property.

Justices' courts: Sec. 510 et seq.; made applicable to: Sec. 870.

Subdivision 5. Value—incorrectly stated in affidavit: Sec. 473.

§ 511. The plaintiff or his attorney may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant.

§ 512. Upon a receipt of the affidavit and notice with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendants, if return thereof be adjudged, and for the payment to him of such sum as may, from any cause, be recovered against the plaintiff, the sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He must, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken, or if neither can be found, by leaving

them at the usual place of abode of either, with some person of suitable age and discretion, or if neither have any known place of abode, by putting them in the nearest post-office, directed to the defendant.

Sheriff's duties: Pol. Code, secs. 4185, 4188, and generally, secs. 4175-4193.

Qualifications of sureties: Sec. 1057.

Return of property to defendant—verdict for: Sec. 627; judgment for: Sec. 667.

Dismissal of action on.—Clerk is to hand undertaking to defendant: Sec. 581; subd. 1.

Officer executing process must produce same on request: Pol. Code, sec. 4188.

Sheriff's duties: Sec. 262.

Value stated in affidavit is not conclusive evidence against sheriff or sureties: Sec. 473.

§ 513. The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest; and the sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

Justification of sureties: See sec. 495, ante.

§ 514. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound

in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in section 519.

As to undertakings generally, see sec. 941; qualifications of sureties, sec. 1057.

§ 515. The defendant's sureties, upon notice to the plaintiff of not less than two or more than five days, must justify before a judge or county clerk, in the same manner as upon bail or arrest; and upon such justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property until that time; if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff.

§ 516. The qualification of sureties must be such as are prescribed by this Code, in respect to bail upon an order of arrest.

Sureties—qualifications of: Sec. 1057, and ante, secs. 494, 495.

§ 517. If the property, or any part thereof be concealed in a building or inclosure, the sheriff must publicly demand its delivery; if it be not delivered, he must cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

Duties of sheriff: See Pol. Code, sec. 4175 et seq.

§ 518. When the sheriff has taken property, as in this chapter provided, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keping the same.

§ 519. If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff is not bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim, by an undertaking, by two sufficient sureties; and no claim to such property by any other person than the defendant or his agent is valid against the sheriff unless so made.

§ 520. The sheriff must file the notice, undertaking, and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

§ 521. [Repealed.] Act approved March 24, 1874; Amendments 1873-4, 306. In effect July 1, 1874.]

CHAPTER III.

INJUNCTION.

§ 525. Injunction, what it is and who may grant it.
§ 526. When it may be granted.
§ 527. At what time it may be granted, and what is required to obtain it.
§ 528. Injunction after answer.
§ 529. Security upon injunction.
§ 530. Order to show cause why injunction should not be granted.
§ 531: Injunction to suspend business of a corporation, how and by whom granted.
§ 532. Motion to vacate or modify injunction.
§ 533. When to be vacated or modified.

§ 525. An injunction is a writ or order requiring a person to refrain from a particular act. It may be granted by the court in which the action is brought, or by a judge thereof; and when made by a judge, it may be enforced as an order of the court. [Amendment, approved March 9, 1880; Amendments 1880, 3. In effect March 9, 1880.]

Injunction.—Disobedience to is contempt: Secs. 1209, 1210; limitations, how affected by: Sec. 356; proceedings to obtain: Secs. 257, to 531; vacating or modifying: Secs. 532, 533.

A seal is necessary to a writ: Sec. 152, subd. 1.

Injunction, kinds of—provisional or preliminary, also called temporary: Sec. 525 et seq.; sec. 526, subds. 2 and 3, permanent or final (including limited and perpetual), sec. 526, subd. 1.

Courts and judges—power to grant injunction, on any day: Secs. 76, 134; at chambers: sec. 166; court commissioners not empowered to issue: Sec. 259, subd. 1.

§ 526. An injunction may be granted in the following cases:

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

2. When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff.

3. When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

Where the obligation arises from a trust: Civ. Code, sec. 3422.

To prevent a legislative act by a municipal corporation: Civ. Code, sec. 3423.

Enjoining nuisance: Sec. 731, post.

Trademark, use of enjoined: Pol. Code, secs. 3196-3199.

Individual cannot restrain public nuisance: See post, secs. 731, et seq.

Mortgage.—Injunction to restrain party in possession from waste during foreclosure suit: Sec. 745.

Disobeying order or process, contempt, etc.: Secs. 1209, 1210.

§ 527. The injunction may be granted at the time of issuing the summons upon the complaint, and at any time afterward, before judgment, upon affidavits. The complaint in the one case, and the affidavits in the other, must show satisfactorily that sufficient grounds exist therefor. No injunction can be granted on the complaint unless it is

verified. When granted on the compaint, a copy of the complaint and verification attached must be served with the injunction; when granted upon affidavit, a copy of the affidavit must be served with the injunction. No injunction granted prior to the actual trial of the cause wherein it is granted shall continue in force for a longer period than twelve months from the time such injunction was granted, except by consent of the parties, or unless the cause be set for trial upon its merits. [Amendment, approved March 12, 1895; Stats. 1895, 51. In effect March 12, 1895.]

Complaint—verification of: Sec. 446.

Service by sheriff: See Sheriff's Duties, Pol. Code, secs. 4175-4191.

§ 528. An injunction cannot be allowed after the defendant has answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

§ 529. On granting an injunction, the court or judge must require, except when the people of the State, a county, or municipal corporation, or a married woman in a suit against her husband, is a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto. Within five days after the service of the injunction, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to,

the plaintiff sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or county clerk in the same manner as upon bail on arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the order granting an injunction shall be dissolved. [Amendment, approved April 15, 1880; Amendments 1880, 62. In effect April 15, 1880.]

Undertakings generally: Sec. 941; returned on dismissal: Sec. 581, subd. 1. Sureties, qualifications of: Sec. 1057; justification of: Sec. 495, also sec. 259, subd. 3.

Court commissioners, power to take bonds and undertakings, examine sureties, etc.: Sec. 259, subd. 3.

§ 530. If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained. In all actions pending or which may be hereafter brought, when an injunction or restraining order has been or may be granted, or applied for, to prevent the diversion pending the litigation, of water used or to be used for irrigation or domestic purposes only, if it be made to appear to the court that the plaintiff is entitled to the injunction, but that the issuance thereof pending the litigation will entail great damage upon the defendant, and that plaintiff can be fully compensated for such damages as he may suffer, the court may refuse the injunction upon the defendant giving a bond, such as is provided for in section 532; and upon the trial the same proceedings shall be had, and with the same effect,

as in said section provided. [Amendment, approved March 24, 1887; Stats. 1887, 240. In effect March 24, 1887.]

§ 531. An injunction to suspend the general and ordinary business of a corporation cannot be granted except by the court or a judge thereof; nor can it be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the people of this State are a party to the proceeding.

§ 532. If an injunction be granted without notice, the defendant at any time before the trial, may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted, or upon affidavit on the part of the defendant, with or without the answer. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the injunction was granted. In all actions pending, or which may be hereafter brought, when an injunction or restraining order has been or may be granted or applied for, to prevent the diversion, pending the litigation, of water used or to be used for irrigation or domestic purposes only, if it be made to appear to the court that great damage will be suffered by the defendant in case the injunction is continued, and that the plaintiff can be fully compensated for any damages he may suffer by reason of the continuance of the acts of the defendant during the pendency of the litigation, the court, in its discretion, may dissolve or modify the injunc-

tion, upon the defendant giving a bond, with sureties to be approved by the judge, and in such amount as may be fixed by the court or judge, conditioned that the defendant will pay all damages which the plaintiff may suffer by reason of the continuance during the litigation of the acts complained of. Upon the trial the amount of such damages shall be ascertained, and in case judgment is rendered for the plaintiff, the amount fixed as such damages shall be included in the judgment, together with reasonable attorneys' fees. Upon a suit brought on the bond the amount of damages as fixed in said judgment shall be conclusive upon the sureties. [Amendment approved March 24; Stats. 1887, p. 240. In effect March 24, 1887.]

Vacating orders made out of court: Sec. 937.

§ 533. If upon such application it satisfactorily appear that there is not sufficient ground for the injunction, it must be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it must be modified.

CHAPTER IV.

ATTACHMENT.

§ 537. Attachment, when and in what cases may issue.
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§ 554. Proceedings to release attachment, before whom taken.
§ 555. Attachment, in what cases it may be released and upon what terms.
§ 556. When a motion to discharge attachment may be made, and upon what grounds.
§ 557. When motion made on affidavit, it may be opposed by affidavit.
§ 558. When writ must be discharged.
§ 559. When writ to be returned.

§ 537. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as in this chapter provided, in the following cases:

1. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this State, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless:

2. In an action upon a contract, express or implied, against a defendant not residing in this State. [In effect July 1st, 1874.]

Attachment, dissolution generally: Secs. 556-558; sheriff's duties, secs. 542, 550, and return, secs. 546, 559; affidavit, see sec. 557; bonds, secs. 539, 555; garnishment, secs. 542, 543-545.

Preventing levy by counter-bond: See sec. 540.

Residence: See Polit. Code, sec. 52.

§ 538. The clerk of the court must issue the writ of attachment, upon receiving an affidavit by or on behalf of plaintiff, showing:

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal setoffs or counter-claims) upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this State, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; or,

2. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal setoffs or counter-claims) and that the defendant is a nonresident of the State; and

3. That the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant. [Amendment approved March 24, 1874; Amendments 1873-4, p. 307. In effect July 1, 1874.]

Duty of clerk: See Polit. Code, sec. 1032.

§ 539. Before issuing the writ the clerk must require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. Within five days after service of the summons in the action, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or county clerk in the same manner as upon bail on arrest, and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the clerk or judge shall issue an order vacating the writ of attachment. [Amendment approved March 30, 1874; Amendments 1873-4, p. 406. In effect March 30, 1874.]

Undertaking, generally: Secs. 259, subd. 3, 581; subd. 1.

Sureties, justification of: Sec. 495; qualifications of: Sec. 1057.

Dismissal of action on.—Clerk is to hand undertaking to defendant: Sec. 581, subd. 1.

§ **540.** The writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case, to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties.

Writ, generally: Sec. 51; seal necessary to writ, sec. 153, subd. 1.

Sheriff, duties, of, excused only by written directions: Polit. Code, sec. 4185; when must show process, Polit. Code, sec. 4188.

Exemptions from execution: Sec. 690.

Bond for release after appearance: Sec. 555.

§ **541.** The rights or shares which the defendant may have in the stock of any corporation or company, together, with the interest and profit thereon, and all debts due such defendant, and all other property in this State of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution.

Stocks or shares, how attached: Sec. 542, subd. 4.

Debts and credits, etc., how attached: Sec. 542, subd. 5.

Garnishment, generally: Secs. 543-545.

§ **542.** The sheriff to whom the writ is directed and delivered must execute the same without de-

lay, and if the undertaking mentioned in section five hundred and forty be not given, as follows:

1. Real property, standing upon the records of the county in the name of the defendant, must be attached, by filing with the recorder of the county, a copy of the writ, together with a description of the property attached, and a notice that it is attached; and by leaving a similar copy of the writ, description, and notice with an occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached.

2. Real property, or an interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county, in the name of any other person, must be attached, by filing with the recorder of the county a copy of the writ, together with a description of the property, and a notice that such real property, and any interest of the defendant therein, held by or standing in the name of such other person (naming him), are attached; and by leaving with the occupant if any, and with such other person, or his agent, if known and within the county, or at the residence of either, if within the county, a copy of the writ, with a similar description and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property. The recorder must index such attachment when filed, in the names, both of the defendant and of the person by whom the property is held or in whose name it stands on the records:

3. Personal property, capable of manual delivery, must be attached by taking it into custody;

4. Stocks or shares, or interest in stocks or shares, of any corporation or company, must be

attached by leaving with the president, or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ;

5. Debts and credits, and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ.

Attachment lien, officer's: Civ. Code, sec. 3057; leviable interest, in mortgaged property, Civ. Code, secs. 2968-2970; fraudulent transfers, Civ. Code, secs. 1227, 3431, 3432, 3439-42.

§ 543. Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession or under his control any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ and a notice that such credits, or other property, or debts, as the case may be, are attached, in pursuance of such writ.

§ 544. All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, un-

less such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied.

Similar provision as to execution: Sec. 716.

§ 545. Any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge, and be examined on oath respecting the same. The defendant may also be required to attend, for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property, capable of manual delivery, to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

Compare, proceedings supplementary to execution: Secs. 714-721.

§ 546. The sheriff must make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached, he must request, at the time of service, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each; and if such memorandum be refused, he must return the fact of refusal with the writ. The party refusing to give the memorandum may be required to pay the costs of any proceedings taken for the

purpose of obtaining information respecting the amounts and description of such debt or credit.

Return of writ, generally: See, infra, sec. 559.

§ 547. If any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution. The proceeds and other property attached by him must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment, recovered previous to the issuing of the attachment. Debts and credits attached may be collected by him, if the same can be done without suit. The sheriff's receipt is a sufficient discharge for the amount paid.

§ 548. Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court or a judge thereof, that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court, to abide the judgment in the action. Such order can be made only upon notice to the adverse party or his attorney, in case such party has been personally served with a summons in the action. [Amendment approved March 9, 1880; Amendments 1880, p. 3. In effect March 9, 1880.]

§ 549. If any personal property attached be claimed by a third person as his property, the same rules shall prevail as to the contents and making of said claim, and as to the holding of said property, as in case of a claim after levy upon execution, as provided for in section six hundred

and eighty-nine of the Code of Civil Procedure. [Amendment approved March 2, 1891; Stats. 1891, p. 20.]

Jury, etc.: Sec. 689.

Sureties on indemnity.—If sheriff gives to sureties notice of action brought against him, the sureties are liable on the judgment: Sec. 1055.

§ 550. If judgment be recovered by the plaintiff, the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant or a claimant as hereinbefore provided, or subjected to execution on another judgment, recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment:

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution.

Disposition of proceeds.—Action against sheriff for amount, and twenty-five per cent. damages, and ten per cent. per month interest, if he neglect to pay over moneys: Sec. 4181, Polit. Code; preference, claims for labor, wages etc., sec. 1206.

Sales on execution: Sec. 692-709.

§ 551. If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts

or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff must proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

Proceedings supplementary to execution: See post, sec. 714.

§ 552. If the execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section five hundred and forty, or section five hundred and fifty-five, or he may proceed as in other cases upon the return of an execution.

§ 553. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent; the order of attachment shall be discharged, and the property released therefrom.

§ 554. Whenever the defendant has appeared in the action, he may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment, wholly or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made, releasing from the operation of the attachment any or all of the property attached; and all of the property so released, and all of the proceeds of the sales thereof, must be delivered to the defendant,

upon the justification of the sureties on the undertaking, if required by the plaintiff. Amendment approved March 9, 1880; Amendments 1880, p. 4. In effect March 9, 1880.]

Appearance: Sec. 1014.

§ 555. Before making such order, the court or judge must require an undertaking on behalf of the defendant, by at least two sureties, residents and freeholders, or householders, in the State, to the effect that in case the plaintiff recover judgment in the action, defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released. The court or judge making such order may fix the sum for which the undertaking must be executed, and if necessary in fixing such sum to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose. The sureties may be required to justify before the court or judge, and the property attached cannot be released from the attachment without their justification, if the same be required. [Amendment approved March 24, 1874; Amendments 1873-4, p. 308. In effect July 1, 1874.]

Undertakings, generally: Secs. 259, subd. 3; 495; 581, subd. 1, 941, 1057.

Undertaking to prevent attachment: Sec. 540.

Court commissioners, power to take bonds, examine sureties, etc.: Sec. 259, subd. 3.

Sureties, qualifications of: Sec. 1057.

Justification: Sec. 495.

§ 556. The defendant may also at any time,

either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued. [Amendment approved March 9, 1880; Amendments 1880, p. 4. In effect March 9, 1880.]

§ 557. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

On affidavits, compare application to dissolve injunction: Sec. 532.

§ 558. If, upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged.

§ 559. The sheriff must return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto; and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be filed in the offices of the county recorders in which the notices of attachment have been filed, and be indexed in like manner. [Amendment approved March 3, 1876; Amendments 1875-6, p. 91.]

Notices of attachment filed: Sec. 542, subds. 1, 2.

Return of inventory with writ: See supra, sec. 546.

CHAPTER V.

RECEIVERS.

§ 564. Appointment of receiver.
§ 565. Appointment of receivers upon dissolution of corporation.
§ 566. Who shall not be appointed.
§ 567. Oath and undertaking.
§ 568. Powers of receivers.
§ 569. Investment of funds.

§ 564. A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry the judgment into effect;

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been return-

ed unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

§ 565. Upon the dissolution of any corporation, the Superior Court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over, among the stockholders or members. [Amendment approved March 9, 1880; Amendments 1880, p. 4. In effect March 9, 1880.]

Dissolution, involuntary: Civ. Code, see secs. 399, 400, and this Code, sec. 802 et seq.; voluntary, sec. 1227 et seq., post.

§ 566. No party, or attorney, or person interested in an action, or related to any judge of the court by consanguinity or affinity within the third degree, can be appointed receiver therein without the written consent of the parties, filed with the clerk. If a receiver be appointed upon an ex parte application, the court, before making the order, may require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed

by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking. [Approved March 3, 1897; Stats. 1897, c. 69.]

Stats. 1850, secs. 16, 18; 1862, sec. 25.

Undertakings generally: Sec. 941.

Qualifications of sureties: Sec. 1057.

Court commissioners, powers to take undertakings, examine sureties, etc.: Sec. 259, subd. 3.

Dismissal of action on.—Clerk to hand undertaking to defendant: Sec. 581, subd. 1.

§ 567. Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge, execute an undertaking to such person, and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

Undertaking, generally.—By Political Code, sec. 981, "the provisions of this article apply to the bonds of receivers, executors, administrators, and guardians." The article referred to is part 3, c. 7, art. 9, and comprises Political Code, secs. 947 to 986 inclusive. Many of those provisions seem quite inapplicable to the undertaking of receivers, etc., and want of space prevents the insertion of the whole in this place. By Political Code, sec. 982, bonds or undertakings given by trustees, receivers, assignees, or officers of a court, are to be in the name of the State of California, and may

by order of the court be prosecuted for the benefit of any person interested. Undertakings, generally: Sec. 941, post.

§ 568. The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize.

§ 569. Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order can be made, except upon the consent of all the parties to the action.

CHAPTER VI.

DEPOSIT IN COURT.

§ 572. Deposit in court.
§ 573. Money paid to clerk must be deposited with county treasurer.
§ 574. Manner of enforcing the order.

§ 572. When it is admitted by the pleading, or shown upon the examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

Deposit with clerk: See, further, sec. 2104.

§ **573.** If the money is deposited in court, it must be paid to the clerk, who must deposit it with the county treasurer, by him to be held subject to the order of the court. For the safekeeping of the money deposited with him the treasurer is liable on his official bond.

Deposit with clerk: Sec. 2104.

§ **574.** Whenever, in the exercise of its authority, a court has ordered the deposit or delivery of money or other thing, and the order is disobeyed, the court, besides punishing the disobedience, may make an order requiring the sheriff to take the money or thing and deposit or deliver it in conformity with the direction of the court.

Punishing the disobedience, contempt: Sec. 1209.

Sheriff's duties, as to official moneys: Polit. Code, sec. 4181.

TITLE VIII.

OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

Chapter I. Judgment in general.
II. Judgment upon failure to answer.
III. Issues—the modes of trial and postponements.
IV. Trial by jury.
V. Trial by the Court.
VI. Of references and trials by referees.
VII. Provisions relating to trials in general.
VIII. The manner of giving and entering judgment.

CHAPTER I.

JUDGMENT IN GENERAL.

§ 577. Judgment defined.
§ 578. Judgment may be for or against one of the parties.
§ 579. Judgment may be against one party and action proceed as to others.
§ 580. The relief to be awarded to the plaintiff.
§ 581. Action may be dismissed or nonsuit entered.
§ 582. All other judgments are on the merits.

§ 577. A judgment is the final determination of the rights of the parties in an action or proceeding.

Judgment, confession by: Sec. 1132; default by, sec. 585; demurrer on, sec. 636; estoppel as to, sec. 1908; generally, 664; nonsuit, sec. 581; pleadings, judgment on, sec. 582; on trial by court, sec. 633; on trial by jury, sec. 664.

Order defined: Sec. 1003.

Final judgment: See, also, secs. 664, 939, post.

§ 578. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

Striking out party: Sec. 473.

Fresh parties, bringing in: Sec. 389.

Service on one defendant out of several, effect of: Sec. 414.

Joint debtors, proceedings against: Sec. 989.

Joining persons severally liable on same instrument: Sec. 383.

Association, action against persons under name of: Sec. 388.

§ 579. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

Striking out party: Sec. 473.

Fresh parties, bringing in: Sec. 389.

Service on one defendant out of several, effect of: Sec. 414.

Joint debtors, proceedings against: Sec. 989.

Joining persons severally liable on same instrument: Sec. 383.

§ 580. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

§ 581. An action may be dismissed, or a judgment of nonsuit entered, in the following cases:

1. By the plaintiff himself, by written request to the clerk, filed among the papers in the case, at any time before trial, upon payment of costs; provided, a counter-claim has not been made, or affirmative relief sought by the cross complaint or answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon;

2. By either party upon the written consent of the other;

3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal;

4. By the court, when, upon the trial and before the final submission of the case, the plaintiff abandons it;

5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury;

6. By the court, when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months.

The dismissals mentioned in subdivisions one and two hereof are made by entry in the clerk's register.

The dismissals mentioned in subdivisions three, four, five, and six of this section, shall be made by orders of the court entered upon the minutes thereof, and shall be effective for all purposes when so entered, but the clerk of the court shall note such orders in his register of actions in the case.

7. And no action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dis-

missed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, and all such actions shall be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served. [Approved March 9, 1897; Stats. 1897, c. 95.]

This section was also amended in 1895; Stats. 1895, p. 31.

Dismissal for want of prosecution: See sec. 594.
Variance, fatal or otherwise: Secs. 469-471.
Trial.—Either party may bring on: Sec. 594.

§ 582. In every case, other than those mentioned in the last section, judgment must be rendered on the merits.

CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

§ 585. In what cases judgment may be had upon the failure of the defendant to answer.

§ 585. Judgment may be had, if the defendant fail to answer the complaint, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendant, or against one or more of several defendants in

the cases provided for in section four hundred and fourteen;

2. In other actions, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk must enter the default of the defendant; and thereafter the plaintiff may apply at the first or any subsequent term of the court for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, is necessary, to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof; or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account be involved, by a reference as above provided;

3. In actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication, and that no answer has been filed, apply for judgment; and the court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the State, must require the plaintiff, or his agent, to be examined on oath, respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover.

Pleadings, judgment on: Sec. 582.
As to validity of service of summons: Sec. 411.
Names, fictitious, amending, etc.: Sec. 474.
Appeal: Sec. 939.
Award, judgment on: Sec. 1286.

Confession, judgment by: Sec. 1133.

Dollars and cents, without fractions, money judgments must be in: Polit Code, sec. 3274.

Fiduciary capacity, judgment against person in: Sec. 667.

Gold coin, judgment in: Sec. 667.

Joint debtors, proceedings against: Sec. 989.

Judgment, generally, docketing, satisfaction, etc.: Secs. 664-675.

Judgment, void, etc., setting aside: Sec. 473.

Mechanics' lien, judgment on: Sec. 1193.

Objections, waiver of, by not demurring or answering: Sec. 434.

Particulars, after order for: Sec. 454.

Pending, action when: Sec. 1049.

Reference: Secs. 638, 639.

Replevin, judgment in: Sec. 667.

CHAPTER III.

ISSUES—THE MODE OF TRIAL AND POSTPONEMENTS.

§ 588. Issue defined, and the different kinds.
§ 589. Issue of law, how raised.
§ 590. Issue of fact, how raised.
§ 591. Issue of law, how tried.
§ 592. Issue of fact, how tried. When issues both of law and fact, the former to be first disposed of.
§ 593. Clerk must enter causes on the calendar, to remain until disposed of.
§ 594. Parties may bring issue to trial.
§ 595. Motion to postpone a trial for absence of testimony, requisites of.
§ 596. In cases of adjournment a party may have the testimony of any witness taken.

§ 588. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and is controverted by the other. They are of two kinds:

1. Of law; and,

2. Of fact.

See secs. 589, 590.

§ 589. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

§ 590. An issue of fact arises—

1. Upon a material allegation in the complaint controverted by the answer; and,

2. Upon new matters in the answer, except an issue of law is joined thereon.

§ 591. An issue of law must be tried by the court, unless it is referred upon consent.

Trial by court, generally: Sec. 631 et seq.

§ 592. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code. [Amendment approved March 24, 1874; Amendments 1873-4, p. 309. In effect July 1, 1874.]

Generally, as to jury trial: See secs. 600-628.

Waiver of jury trial: Sec. 631.

Reference: Secs. 638-645.

Court, trial by: Secs. 631-636.

§ 593. The clerk must enter causes upon the calendar of the court according to the date of

issue. Causes once placed on the calendar must remain upon the calendar until finally disposed of; provided, that causes may be dropped from the calendar by consent of parties, and may be again restored upon notice. [In effect March 9, 1880.]

Clerk placing on calendar, mandamus for failure: Sec. 1085.

Issue, generally: Sec. 588.

Abolition of terms: See Const. Cal., art. 6, sec. 5.

§ **594**. Either party may bring an issue to trial or to a hearing, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.

Dismissal: Sec. 581.

Answer, service of, where plaintiff cannot be found: Sec. 465.

Surprise, setting aside judgment for: Sec. 473.

New trial: Sec. 657.

§ **595**. A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. A trial shall be postponed when it appears to the court that the attorney of record, party, or principal witness is actually engaged in attendance upon a session of the legislature of this State as a member thereof. The court may require the moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as

actually given on the trial, or offered and overruled as improper, the trial must not be postponed. [Amendment approved March 2, 1880; Amendments 1880, p. 1. In effect March 2, 1880.]

Costs on continuance: See sec. 1029.

§ 596. The party obtaining a postponement of a trial in any court of record must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate, which must accordingly be done, and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witnesses were produced.

Depositions, in the State: Secs. 2019-2021, 2031-2038.

CHAPTER IV.

TRIAL BY JURY.

Article I. Formation of Jury.
II. Conduct of the Trial.
III. The Verdict.

ARTICLE I.

FORMATION OF THE JURY.

§ 600. Jury, how drawn.
§ 601. Challenges. Each party entitled to four peremptory challenges.
§ 602. Grounds of challenge.
§ 603. Challenges, how tried.
§ 604. Jury to be sworn.

§ 600. When the action is called for trial by jury, the clerk must draw from the trial jury box

of the court the ballots containing the names of the jurors, until the jury is completed or the ballots are exhausted.

Jury, generally, secs. 190-254; trial jury, secs. 193, 194.

Trial by jury, conduct of: Sec. 607 et seq.; waiver of, sec. 631; verdict after, sec. 624 et seq.

Trial jury box: Sec. 246.

Jurors, who are competent: Secs. 198, 190.

Exemptions and excuses: Secs. 200-202.

§ 601. Either party may challenge the jurors; but where there are several parties on either side, they must join in a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff. [Amendment approved March 24, 1874; Amendments 1873-4, p. 310. In effect July 1, 1874.]

Challenge for cause: Sec. 202.

§ 602. Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by this Code to render a person competent as a juror;

2. Consanguinity or affinity within the fourth degree to any party;

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party, or being a member of the family of either party, or a partner in business with either party, or surety on any bond or obligation for either party;

4. Having served as a juror or been a witness

on a previous trial between the same parties, for the same cause of action;

5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation;

6. Having an unqualified opinion or belief as to the merits of the action, founded upon knowledge of its material facts, or of some of them;

7. The existence of a state of mind in the juror evincing enmity against or bias to or against either party. [Amendment approved March 24, 1874; Amendments 1873-4, p. 310. In effect July 1, 1874.]

Subd. 1. Want of necessary qualifications.—Competent jurors: Sec. 198. Incompetent jurors: Sec. 199. Exemptions and excuses: Sec. 200.

Subd. 2. Consanguinity or affinity, generally: See sec. 170, ante.

Challenge in criminal causes: See Pen. Code, secs. 1055 et seq.

§ 603. Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

§ 604. As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between ——, the plaintiff, and ——, defendant, and a true verdict render, according to the evidence.

Oath, administration of: See secs. 2093-2097.

ARTICLE II.

CONDUCT OF THE TRIAL.

§ 607. Order of proceedings on trial.
§ 608. Charge to the jury. Court must furnish, in writing, upon request, the points of law contained therein.
§ 609. Special instructions.
§ 610. View by jury of the premises.
§ 611. Admonition when jury permitted to separate.
§ 612. Jury may take with them certain papers.
§ 613. Deliberation of jury, how conducted.
§ 614. May come into court for further instructions.
§ 615. Proceedings in case a juror becomes sick.
§ 616. When prevented from giving verdict, the cause may be again tried.
§ 617. While jury are absent, court may adjourn from time to time. Sealed verdict. Final adjournment discharges the jury.
§ 618. Verdict, how declared. Form of. Polling the jury.
§ 619. Proceedings when verdict is informal.

§ 607. When the jury has been sworn, the trial must proceed in the following order, unless the judge, for special reasons, otherwise directs:

1. The plaintiff, after stating the issue and his case, must produce the evidence on his part;

2. The defendant may then open his defense, and offer his evidence in support thereof.

3. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

4. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the plaintiff must commence and may conclude the argument;

5. If several defendants, having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;

6. The court may then charge the jury.

Order of proof, discretion of court, as to, generally: Sec. 2042.

Proceedings, etc., on trial.—Amendments: Sec. 473. Arguments: Sec. 607. Charge to jury: Secs. 608, 609. Contempts: Secs. 1209-1222. Continuance: Secs. 595, 596. Crim. con., private trial: Sec. 125. Damages, interest, etc.: Sec. 426, note. Divorce, private trial: Sec. 125. Either party may bring on trial: Sec. 594. Errors to be disregarded: Sec. 475. Exceptions: Secs. 646-653. Fact, questions of, are for jury: Sec. 2102. Inspection of writings: Sec. 100. Instructions to jury: Secs. 608, 609. Judge, disqualification of: Sec. 170. Language of proceedings: Secs. 185, 1056. Law, questions of, are for court: Sec. 2102. Marriage, breach of promise of, private trial: Sec. 125. Nonsuit, etc.: Sec. 581. As to the proof necessary to make out a case, see secs. 1867, 1869, post. Phonographic reporters: Secs. 269-274. Place of trial: Secs. 392-400. Pleadings, construction of: Secs. 452-465. Proof, etc., order of: Secs. 607, 2042. Reference, by consent, Sec. 638. Compulsory: Sec. 639. Seduction, private trial: Sec. 125. Title of papers, defective: Sec. 1046. Variance: Secs. 469-471. Arguments: sec. 607. Charging the jury: See infra, secs. 608, 609. Verdict: Secs. 624-628. View by jury: Sec. 610.

Evidence.—Admissibility is for court: Sec. 2102. Allegations, material only need be proved: Sec. 1867. Burden of proof: Secs. 1869, 1981. Declarations, acts, admissions, etc.: Secs. 1848, 1854, 1870; secs. 2-8. Estoppel: Secs. 1962, 1978. Indispensable evidence, including statute of frauds, etc.: Secs. 1967-1974. Judicial knowledge: Sec. 1875; jury to accept: Sec. 2102. Presumptions: Secs. 1957-1963. Offer to compromise: Secs. 997, 2074, 2078. Proof, order of: Sec. 2042. Relevancy of evi-

dence, secs. 1868-1870. Relevancy, collateral facts: Secs. 1868, 1870. Tender: Sec. 2076.

Witnesses.—Affidavits: Secs. 2009-2015. All persons may be: Sec. 1879; including judge: Sec. 1883; exceptions: Secs. 1880, 1881; must be sworn, or affirm: Sec. 1846. Answer, witness must: Sec. 2065. Arrest of witness: Sec. 2070. Common reputation, testimony as to: Sec. 1870, subd. 11. Compelling attendance: Secs. 1985-1997, 2064. Credibility: Secs. 1847, 1870, subd. 16. Cross-examination: Sec. 2048. Depositions: Secs. 2019-2038. Perpetuating testimony: Secs. 2083-2089. Direct examination: Sec. 2045. Excluding witnesses from court room: Sec. 2043. Experts: Sec. 1870, subd. 9. Impeaching, and evidence of good character: Secs. 2049-2054. Insanity, etc., opinion as to: Sec. 1870, subd. 10. Interpreters: Sec. 1884. Leading questions: Sec. 2046. Mode of interrogation: Sec. 2044. Oaths: Secs. 2093-2097. One witness sufficient to prove a fact, except perjury and treason: Sec. 1844. Personal knowledge, witness must testify as to: Sec. 1845. Presumed to speak truth; repelling presumption; credibility for jury: Sec. 1847. Protection of witnesses: Sec. 2066. Refreshing memory: Sec. 2047. Testimony, clerk to take down, if no shorthand reporter: Sec. 1051. Usage, testimony as to: Sec. 1870, subd. 12. Writing shown to witness, other side may see: Sec. 2054.

Writings.—Agreement reduced to: Sec. 1856. Common reputation, monuments, family books, etc.: Sec. 1870, subd. 13. Construction: Secs. 1857-1866; is for court: Sec. 2102; descriptive part of conveyances of real property: Sec. 2077: Secs. 1855, 1870, subd. 14. Erasures: Sec. 1982. Inspection: Sec. 1000. Private writings: Secs. 1929-1951. Public writings: Secs. 1892-1926. Receipts: Sec. 2075.

Material objects.—Generally: Sec. 1954.

Judicial knowledge.—Generally: Sec. 1875.

Jury to accept: Sec. 2102.

§ 608. In charging the jury, the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon request, a statement, in writing, of the points of law contained in the charge, or sign at the time a statement of such points prepared and submitted by the counsel of either party.

Matters of law, court stating in charge: Const. Cal., art. 7, sec. 19; sec. 2102, also sec. 2061; sec. 657, subd. 7.

§ 609. Where either party asks special instructions to be given to the jury, the court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part.

Exceptions: Sec. 646.

§ 610. When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

§ 611. If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the

court that it is their duty not to converse with or suffer themselves to be addressed by any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

§ 612. Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person.

§ 613. When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they or three-fourths of them are agreed upon a verdict; and he must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon. [Amendment approved March 10, 1880; Amendments 1880, p. 10. In effect March 10, 1880.]

Three-fourths, agreement of, amendment, 1880: See Const. Cal., art. 1, sec. 7.

§ 614. After the jury have retired for deliberation, if there be a disagreement between them as

to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel.

Holidays, Sundays, etc.—Instructions may be given to juries deliberating on: Sec. 134, subd. 1.

On nonjudicial days: Sec. 134, subd. 1.

§ 615. If, after the impaneling of the jury, and before verdict, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterward impaneled.

§ 616. In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct.

§ 617. While the jury are absent the court may adjourn from time to time, in respect to other business; but it is nevertheless open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict, at the opening of the court, in case of an agreement during a recess or adjournment for the day. [Amendment approved March 10, 1880; Amendments 1880, p. 10. In effect March 10, 1880.]

§ 618. When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict; if upon such inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case. [Amendment approved March 10, 1880; Amendments 1880, p. 10. In effect March 10, 1880.]

Verdict received, on nonjudicial day: Sec. 134.

§ 619. When the verdict is announced, if it is informal or insufficient in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

ARTICLE III.

THE VERDICT.

§ 624. General and special verdicts defined.
§ 625. When a general or special verdict may be rendered.
§ 626. Verdict in actions for recovery of money or on establishing counterclaim.
§ 627. Verdict in actions for the recovery of specific personal property.
§ 628. Entry of verdict.

§ 624. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts

only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented, as that nothing shall remain to the court but to draw from them conclusions of law.

Special verdict: Sec. 625.

Ejectment.—Where plaintiff's right terminated pending action: Sec. 740.

Improvements, claim for: Sec. 741.

Misconduct of jury: Sec. 657, subd. 2.

Several, judgment for or against, some of: Secs. 578, 579.

Intendments in favor of verdict: Sec. 53, note; sec. 1963, subd. 18.

Amendments: Sec. 473.

§ 625. In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.

Submitting special issues in equity causes: Sec. 592.

§ 626. When a verdict is found for the plaintiff, in an action for the recovery of money, or for the

defendant when a counterclaim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery.

§ 627. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or, if being in favor of the defendant, they also find that he is entitled to a return thereof, must find the value of the property, and, if so instructed, the value of specific portions thereof, and may, at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property. [Amendment approved March 24, 1874; Amendments 1873-4, p. 311. In effect July 1, 1874.]

Jury must find, etc.: See post, sec. 667, and compare with sec. 509.

§ 628. Upon receiving a verdict, an entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and setting out the verdict at length, and where a special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it.

CHAPTER V.

TRIAL BY THE COURT.

§ 631. When and how trial by jury may be waived.
§ 632. Upon trial by court, decision to be in writing and filed within twenty days.
§ 633. Facts found and conclusions of law must be separately stated. Judgment on.
§ 634. Findings may be waived, how.
§ 635. Findings, how prepared.
§ 636. Proceedings after determination of issue of law.

§ 631. Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions, in manner following:

1. By failing to appear at the trial;

2. By written consent, in person or by attorney, filed with the clerk;

3. By oral consent, in open court, entered in the minutes. [Amendment approved March 24, 1874; Amendments 1873-4, p. 311. In effect July 1, 1874.]

Waiver of jury trial: See Const. Cal., art. 1, sec. 7; court disregarding, secs. 309, 592.

Submitting special issues to a jury: See sec. 592, ante.

§ 632. Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision. [Amendment approved March 24, 1874; Amendments 1873-4, p. 312. In effect July 1, 1874.]

§ 633. In giving the decision, the facts found and the conclusions of law must be separately

stated. Judgment upon the decision must be entered accordingly.

§ 634. Findings of fact may be waived by the several parties to an issue of fact:

1. By failing to appear at the trial;
2. By consent in writing, filed with the clerk;
3. By oral consent in open court, entered in the minutes.

§ 635. Repealed. [Amendments 1875-6, p. 91. In effect April 3, 1876.]

§ 636. On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of section five hundred and eighty-five, upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law, and the taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference may be ordered as in that section provided.

Issue of law: Sec. 589; when a bar, see sec. 1908.

Reference: Sec. 638 et seq.

Leave to answer, after defendant's demurrer overruled: Sec. 472.

Default, judgment by: Sec. 585.

Judgment, generally: Sec. 664.

CHAPTER VI.

OF REFERENCES AND TRIALS BY REFEREES.

§ 638. Reference ordered upon agreement of parties, in what cases.
§ 639. Reference ordered on motion, in what cases.
§ 640. Number of referees, qualifications, etc.
§ 641. Either party may object. Grounds of objection.
§ 642. Objections, how disposed of.
§ 643. Referees to report within ten days. Effect of. How excepted to, etc.
§ 644. Effect of referees' finding.
§ 645. How excepted to, etc.

§ 638. A reference may be ordered upon the agreement of the parties filed with the clerk or entered in the minutes:

1. To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon:

2. To ascertain a fact necessary to enable the court to determine an action or proceeding.

Reference in general, court commissioners: Sec. 259, subd. 2; fees for, sec. 1028; private trial, sec. 125; compulsory, see next section.

Referees, number, etc., sec. 640; objections to, secs. 641, 642; report of, secs. 643-45.

Trial by referee: Sec. 1053.

§ 639. When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. When the trial of an issue of fact requires the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein;

2. When the taking of an account is necessary

for the information of the court before judgment, or for carrying a judgment or order into effect;

3. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action;

4. When it is necessary for the information of the court in a special proceeding.

Reference on proceedings supplementary to execution: Sec. 714, post.

§ 640. A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection, or the reference may be made to a court commissioner of the county where the cause is pending.

Reference ordered: See secs. 638, 639.

Three referees, two may act: Sec. 1053.

Court commissioner: Sec. 259, subd. 2.

§ 641. Either party may object to the appointment of any person as referee, on one or more of the following grounds:

1. A want of any of the qualifications prescribed by statute to render a person competent as a juror;

2. Consanguinity, or affinity, within the third degree, to either party, or to any judge of the court, in which the appointment shall be made;

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party; or, being a member of the family of either party; or a partner in business with either party; or being security on any bond or obligation for either party;

4. Having served as a juror or been a witness

on any trial between the same parties for the same cause of action;

5. Interest on the part of such person in the event of the action, or in the main question involved in the action;

6. Having formed or expressed an unqualified opinion or belief as to the merits of the action;

7. The existence of a state of mind in such person evincing enmity against or bias to either party. [Approved March 3, 1897; Stats. 1897, c. 69.]

§ 642. The objections taken to the appointment of any person as referee must be heard and disposed of by the court. Affidavits may be read and witnesses examined as to such objections.

Objections: See sec. 641.

§ 643. The referees or commissioner must report their findings in writing to the court, within twenty days after the testimony is closed, and the facts found and conclusions of law must be separately stated therein.

Referees: See secs. 640-642.

Reference: Secs. 638, 639.

Commissioner: Sec. 259, subd. 2.

Referees, where three, all must meet, but two can act: Sec. 1053.

Enforcing order: Sec. 128, subd. 2.

Findings, effect of: Sec. 645.

§ 644. The finding of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court.

§ 645. The finding of the referee or commissioner may be excepted to and reviewed in like

manner as if made by the court. When the reference is to report the facts, the finding reported has the effect of a special verdict.

Exceptions, generally: Secs. 646 et seq.; new trials, sec. 656 et seq.; court commissioner's report, time and mode of excepting to, sec. 259, subd. 2.

CHAPTER VII.

PROVISIONS RELATING TO TRIALS IN GENERAL.

Article I. Exceptions.
II. New Trials.

ARTICLE I.

EXCEPTIONS.

§ 646. Exceptions may be taken. Time when taken, etc.
§ 647. What deemed excepted to.
§ 648. Exception, form of.
§ 649. Exceptions signed by judge and filed with clerk.
§ 650. Exceptions not presented at time of ruling. Notice to adverse party, how settled upon, etc.
§ 651. Exceptions after judgment, etc.
§ 652. When exception is refused, application to Supreme Court to prove the same, etc.
§ 653. Proceedings when judge ceases to hold office.

§ 646. An exception is an objection upon a matter of law to a decision made, either before or after judgment, by a court, tribunal, judge, or other judicial officer, in an action or proceeding. The exception must be taken at the time the decision is made, except as provided in sec. 647. [Amendment approved April 3, 1876; Amendments 1875-6, p. 91. In effect, June 1, 1876.]

Matters deemed excepted to: Sec. 647.
Absence of party, as affecting: Sec. 647.
Amendments to: Sec. 650.

§ 647. The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the rights of the parties, or some of them; an order or decision from which an appeal may be taken; an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance; an order made upon ex parte application, and an order or decision made in the absence of a party, are deemed to have been excepted to. [Amendment approved April 3, 1876; Amendments 1875-6, p. 91. In effect June 1, 1876.]

§ 648. No particular form of exception is required, but when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated with so much of the evidence or other matter as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto, sufficient to identify them, may be made. [Amendment approved April 3, 1876; Amendments 1875-6, 91. In effect June 1, 1876.]

§ 649. A bill containing the exception to any decision may be presented to the court or judge for settlement, at the time the decision is made, and after having been settled, shall be signed by the judge and filed with the clerk. When the decision excepted to is made by a tribunal other than a court, or by a judicial officer, the bill of exceptions shall be presented to, and settled and signed

by such tribunal or officer. [Amendment approved April 3, 1876; Amendments 1875-6, 91. In effect June 1, 1876.]

Refusal to settle: See sec. 682, infra.

§ 650. When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within ten days after the entry of judgment, if the action were tried with a jury, or after receiving notice of the entry of judgment, if the action were tried without a jury, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party. Such draft must contain all the exceptions taken upon which the party relies. Within ten days after such service the adverse party may propose amendments thereto, and serve the same, or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the Clerk of the Court for the Judge. When received by the Clerk he must immediately deliver them to the Judge, if he be in the county; if he be absent from the county, and either party desire the papers to be forwarded to the Judge, the Clerk must, upon notice in writing of such party, immediately forward them by mail, or other safe channel; if not thus forwarded, the Clerk must deliver them to the Judge immediately after his return to the county. When received from the clerk, the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time designated, the judge must settle the bill,

If the action was tried before a referee, the proposed bill, with the amendments, if any, must be presented to such referee for settlement within ten days after service of the amendments, upon notice of five days to adverse party, and thereupon the referee shall settle the bill. If no amendments are served, or if served are allowed, the proposed bill may be presented, with the amendments, if any, to the judge or referee, for settlement, without notice to the adverse party. It is the duty of the judge or referee, in settling the bill, to strike out of it all redundant and useless matter so that the exceptions may be presented as briefly as possible. When settled, the bill must be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk. [Amendment approved March 24, 1874; Amendments 1873-4, 313. In effect July 1, 1874.]

Further time: Sec. 1054.

New trial, bill of exceptions, sec. 659, subd. 2; requisites, of bill of exceptions, sec. 648.

Bills of exception in criminal causes: See Pen. Code, secs. 1171 et seq.

§ 651. Exceptions to any decision made after judgment may be presented to the judge at the time of such decision, and be settled or noted, as provided in sec. 649, and a bill thereof may be presented and settled afterward, as provided in sec. 650, and within like periods after entry of the order, upon appeal from which such decision is reviewable. [Amendment approved March 24, 1874; Amendments 1873-4, 304. In effect July 1, 1874.]

§ 652. If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the Supreme Court to prove the same; the

application may be made in the mode and manner, and under such regulations as that court may prescribe; and the bill, when proven, must be certified by the Chief Justice as correct, and filed with the Clerk of the Court in which the action was tried, and when so filed it has the same force and effect as if settled by the Judge who tried the cause.

§ 653. When the decision excepted to was made by any judicial officer other than a judge, the bill of exceptions shall be presented to such judicial officer and be settled and signed by him, in the same manner as it is required to be presented to, settled, and signed by a court or judge. A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the State, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the Supreme Court may by its order or rules direct. Judges, judicial officers, and the Supreme Court shall respectively possess the same power, in settling and certifying statements, as is by this section conferred upon them in settling and certifying bills of exceptions. [Amendment approved April 3; Amendments 1875-6, 93. In effect June 1, 1876.]

ARTICLE II.

NEW TRIALS.

§ 656. New trial defined.
§ 657. When a new trial may be granted.
§ 658. On what papers moved for.
§ 659. Notice of motion, upon whom served, and what to contain.
§ 660. Motion to be heard at the time specified, or dismissed.
§ 661. Judge to make statement on decision of the motion. This statement to constitute bill of exceptions.
662. New trial on court's own motion.
663. Repealed.

§ 656. A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees.

§ 657. The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial;

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

3. Accident or surprise, which ordinary prudence could not have guarded against;

4. Newly-discovered evidence, material for the party making the application, which he could not,

with reasonable diligence, have discovered and produced at the trial;

5. Excessive damages appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;

7. Error in law, occurring at the trial and excepted to by the party making the application.

How the application is to be made: Sec. 658.

Discretion.—Court may grant a new trial of its own motion: Sec. 662.

Verdict against law: See sec. 662, post.

§ 658. When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the last section, it must be made upon affidavits; for any other cause it may be made at the option of the moving party, either upon the minutes of the court, or a bill of exceptions, or a statement of the case, prepared as hereinafter provided. [Amendment approved March 24, 1874; Amendments 1873-4, 314. In effect July 1, 1874.]

Mode of application—affidavits, on, sec. 659, subd. 1; minutes of court, on, sec. 659, subd. 4; bill of exceptions, on, sec. 659, subd. 2; statement of case, on, sec. 659, subd. 3.

§ 659. The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the court, or a bill of exceptions, or a statement of the case:

1. If the motion is to be made upon affidavits, the moving party must, within ten days after serving the notice, or such further time as the court in which the action is pending, or a judge thereof, may allow, file such affidavits with the clerk, and serve a copy upon the adverse party, who shall have ten days to file counter affidavits, a copy of which must be served upon the moving party;

2. If the motion is to be made upon a bill of exceptions, and no bill has already been settled as hereinbefore provided, the moving party shall have the same time after service of the notice to prepare and obtain a settlement of a bill of exceptions as is provided after the entry of judgment, or after receiving notice of such entry by section 650, and the bill shall be prepared and settled in a similar manner. If a bill of exceptions has been already settled and filed, when the notice of motion is given, such bill shall be used on the motion.

3. If the motion is to be made upon a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending, or the judge thereof, may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party. If such proposed statement be not agreed to by the adverse party, he must, within ten days thereafter, prepare amendments thereto, and serve the same, or a copy thereof, upon the moving party. If the amendments be adopted, the statement shall be amended accordingly, and then presented to the judge who tried or heard the cause, for settlement, or be delivered to the Clerk of the Court for the Judge. If not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the Judge, upon

five days' notice to the adverse party, or delivered to the Clerk of the Court for the judge; and thereupon the same proceedings for the settlement of the statement shall be taken by the parties, and Clerk, and Judge, as are required for the settlement of bills of exception by section 650. If the action was heard by a referee, the same proceedings shall be had for the settlement of the statement by him as are required by that section for the settlement of bills of exception by a referee. If no amendments are served within the time designated, or, if served, are allowed, the proposed statement and amendments, if any, may be presented to the Judge or referee, for settlement, without notice to the adverse party. When the notice of the motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion. It is the duty of the Judge or referee, in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement. When settled, the statement shall be signed by the Judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk;

4. When the motion is to be made upon the minutes of the court, and the ground of the mo-

tion is the insufficiency of the evidence to justify the verdict or other decision the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and, if the ground of the motion be errors in law occurring at the trial, and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain the specifications here indicated, when the motion is made on the minutes of the court, the motion must be denied. [Amendment approved March 24, 1874; Amendments 1873-4, 315. In effect July 1, 1874.]

Bill of exceptions, settling: Sec. 650.

Time, extension of: Sec. 1054.

Extension of time: Sec. 1054. Time to except to Court Commissioner's report on matters other than issues of fact raised by pleadings: Sec. 259.

Minutes of court, motion on, statement: Sec. 661.

§ 660. The application for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court, and in other cases, after the affidavits, bill of exceptions, or statement, as the case may be, are filed, and may be brought to a hearing upon motion of either party. On such hearing reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions, documentary evidence, and phonographic report of the testimony on file. [Amendment approved March 24, 1874; Amendments 1873-4, 317. In effect July 1, 1874.]

Chambers, motions for new trials may be heard at: Secs. 166, 663.

§ 661. The judgment roll and the affidavits, or bill of exceptions, or statement, as the case may

be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial, unless the motion be made on the minutes of the court, and in that case the judgment roll and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal. Such subsequent statement shall be proposed by the party appealing, or intending to appeal, within ten days after the entry of the order, or such further time as the court in which the action is pending, or a judge thereof, may allow, and the same or a copy thereof be served upon the adverse party, who shall have ten days thereafter to prepare amendments thereto and serve the same or a copy thereof, upon the party appealing, or intending to appeal; and thereafter proceedings shall be had, and within like periods, for the settlement of the statement as provided by section 659, but the statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain them; and it shall be the duty of the Judge to exclude all other evidence or matter from the statement. [Amendment approved March 24, 1874; Amendments 1873-4. 318. In effect July 1, 1874.]

Judgment roll: Sec. 670.

Affidavits, bill of exceptions, statement: Sec. 659, subds. 1, 2, 3.

Minutes of court: Sec. 660.

§ 662. The verdict of a jury may also be vacated, and a new trial granted by the court in which the action is pending, on its own motion, without the application of either of the parties, when there has been such a plain disregard by the jury of the instructions of the court, or the evi-

dence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice. The order of the court may be reviewed on appeal in the same manner as orders made on motions for a new trial, and a statement to be used on such appeal may be prepared in the same manner as statements after a motion is heard upon the minutes of the court, as provided in section 661. [New section approved March 24, 1874; Amendments 1873-4, 318. In effect July 1, 1874.]

§ 663. A judgment or decree of a Superior Court, when based upon findings of fact made by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of such party and entitling him to a different judgment:

1. Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact; and in such case when the judgment is set aside the conclusions of law shall be amended and corrected;

2. A judgment or decree not consistent with or not supported by the special verdict. [New section approved March 3, 1897; Stats. 1897, c. 67. In effect immediately.]

There had previously been another section 663, which was repealed in 1880; Amendments 1880, 64.

§ 663½. The party intending to make the motion mentioned in the last section must, within ten days after notice of the rendition of judgment or decree, serve upon the adverse party and file with the clerk of the court a notice of his in-

tention, designating the grounds upon which the motion will be made, and specifying the particulars in which the conclusions of law are not consistent with the finding of facts, or in which the judgment or decree is not consistent with the special verdict. The said party must, within sixty days after giving such notice of intention, make the motion to the court, after giving due notice of the time of making such motion to the adverse party; but the hearing or consideration of such motion may be further continued by the court. [New section approved March 3, 1897; Stats. 1897, c. 67.]

CHAPTER VIII.

THE MANNER OF GIVING AND ENTERING JUDGMENT.

§ 634. Judgment to be entered in twenty-four hours, etc.
§ 665. Case may be brought before the court for argument.
§ 666. When counter-claim established exceeds plaintiff's demand.
§ 667. In replevin, judgment to be in the alternative, and with damages. Gold coin or currency judgment.
§ 668. Judgment book to be kept by the clerk.
§ 669. If a party die after verdict, judgment may be entered, but not to be a lien.
§ 670. Judgment roll, what to constitute.
§ 671. Judgment lien, when it begins and when it expires.
§ 672. Docket, how kept, and what to contain.
§ 673. Docket to be open for inspection without charge.
§ 674. Transcript to be filed in any county, and judgment to become a lien there.
§ 675. Satisfaction of a judgment, how made.

§ 664. When trial by jury has been had, judgment must be entered by the Clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings.

Reserving, for argument or further consideration: Sec. 665.

Stay of proceedings, by appeal: Sec. 949.

Abbreviations and numerals: Sec. 186.

Administrator, judgment against: Sec. 1504.

Appeal from judgment: Sec. 930.

Arrest of defendant: Sec. 684.

Attachment.—If plaintiff hold, Sheriff must satisfy out of proceeds: Sec. 550.

Award, judgment on: Sec. 1286.

Compelling obedience to judgments: Secs. 128. subd. 4; 1209 et seq.

Compromise, judgment after offer to: Sec. 997.

Counter-claim, judgment on: Sec. 666.

Courts are always open for the entry of judgment: Sec. 73.

Currency, etc.: Sec. 667.

Death of party: See sec. 669, post. See sec. 1589, post, as to suits by the representatives to set aside fraudulent deeds.

Default, judgment by: Sec. 585.

Demurrer, judgment on: Sec. 636.

Dismissal: Sec. 581.

Estoppel: Sec. 1908.

Executor, judgment against: Sec. 1504.

Further consideration: Sec. 665.

Gold coin, etc.: Sec. 667.

Intervention, judgment after: Sec. 387.

Language, proceedings to be in English: Sec. 185.

Married woman: Secs. 370, 371.

Mechanics' liens: Sec. 1194.

Mistakes and amendments: Sec. 473.

Money of account.—The money of account of this State is the dollar, cent, and mill. Public accounts, and all proceedings in courts, must be kept and had in conformity to this regulation: Polit. Code, sec. 3272. The provisions of the preceding section do not vitiate or affect any account, charge, or entry, originally made, or any note, bond, or

other instrument, expressed in any other money of account, but the same must be reduced to dollars, or parts of dollars in any suit thereupon: Polit. Code, sec. 3273. In judgments and executions, the amount thereof must be computed and stated, as near as may be, in dollars and cents, rejecting fractions: Polit. Code, sec. 3274.

Money, kind of, specified: Sec. 667.

Nonsuit: Sec. 581.

Parties: Sec. 367. Judgment against one or more of several: Secs. 578, 579. Death of party: Secs. 385, 669.

Partition: Sec. 766.

Receiver to carry judgment into effect, and preserve property during pendency of appeal, etc.: Sec. 564.

Relief: Sec. 580.

Remittitur: Sec. 958.

§ 665. When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument.

§ 666. If a counter-claim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

Counter-claim, generally: Secs. 438, 439; dismissal or nonsuit, where none, sec. 581, subd. 1. Exceeding plaintiff's demand: Sec. 626. Affirmative relief: See sec. 447.

§ 667. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case

a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in all actions for the recovery of money, if the plaintiff allege in his complaint that the same was understood and agreed by the respective parties to be payable in a specified kind of money or currency, and this fact is admitted by the default of the defendant or established by evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff must be made payable in the kind of money or currency so received by such person.

See sec. 664.

Replevin judgment—verdict: Sec. 627; value, correcting affidavit of: Sec. 473.

Evidence: Sec. 1963, subd. 20.

Execution: Sec. 682, subd. 4.

Replevin, return to defendant: See also sec. 509, ante, and sec. 627.

Trust funds—Fiduciary capacity: Sec. 1407.

§ 668. The clerk must keep, with the records of

the court, a book to be called the "judgment book," in which judgments must be entered.

Register of actions: Sec. 1052.

§ 669. If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate.

Payable in course of administration: Sec. 1506, and see sec. 1504.

Death, suggestion of: Sec. 385.

Executor, etc., judgment against, form of: Sec. 1504.

§ 670. Immediately after entering the judgment, the clerk must attach together and file the following papers, which constitute the judgment-roll:

1. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service; the complaint with a memorandum indorsed thereon that the default of the defendant is not answering was entered, and a copy of the judgment; and in case where the service so made be by publication, the affidavit for publication of summons, and the order directing the publication of summons, must also be included;

2. In all other cases, the pleadings, a copy of the verdict of the jury, or finding of the court, or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer, or relating to the change of parties, and a copy of the judgment; if there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service on such defendant, must

also be added to the other papers mentioned in this subdivision; and if the service on such defaulting defendant be by publication, then the affidavit for publication, and the order directing the publication of the summons in such cases must also be included. [Amendment approved March 12, 1895; Stats. 1895, 45. In effect in sixty days.]

Judgment-roll in criminal cases: See Pen. Code, sec. 1207.

Clerk's powers and duties, county clerk: See Polit. Code, secs. 4204, 4205; deputies: See Polit. Code, secs. 865, 4112-4114; functions generally, see sec. 585, subds. 1 and 2, 593, 664, 668, 671-3, 1051, 1052, 2012.

Judgment, by default: Sec. 585.

§ 671. Immediately after filing the judgment-roll, the Clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until the lien ceases. The lien continues for five years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this Code, in which case the lien of the judgment and any lien by virtue of an attachment that has been issued and levied in the action ceases. [Amendment approved March 9, 1895; Stats. 1895, 36. In effect March 9, 1895.]

Judgment docket: See secs. 672-674.

Recording transcript of docket in another county: Sec. 674.

Judgment after decedent's death, on verdict, etc., before: Sec. 1506.

Undertaking on appeal: Secs. 941 et seq.

§ 672. The docket mentioned in the last section is a book which the Clerk keeps in his office, with each page divided into eight columns, and headed as follows: Judgment debtors; judgment creditors; judgment; time of entry; where entered in judgment book; appeals, when taken; judgment of appellate court; satisfaction of judgment, when entered. If judgment be for the recovery of money or damages, the amount must be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted must be stated. The names of the defendants must be entered in alphabetical order.

Docketing judgment: Sec. 671.

Duty of Clerk to keep docket: Polit. Code, sec. 4204, subd. 3.

§ 673. The docket kept by the Clerk is open at all times, during office hours, for the inspection of the public, without charge. The Clerk must arrange the several dockets kept by him in such a manner as to facilitate their inspection.

Public writings, open to inspection: Secs. 1892, 1893.

§ 674. A transcript of the original docket, certified by the Clerk, may be filed with the Recorder of any other county, and from the time of the filing the judgment becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterward, and before the lien expires acquire. The lien continues for two years, unless the judgment be previously satisfied.

Another county, filing transcript in: Civ. Code, sec. 1159; where land situated: Sec. 400, ante; but see sec. 78.

Recording generally: Secs. 1165, 1169, 1170.

Justice's Court judgment, abstract creates lien: Sec. 900.

§ 675. Satisfaction of a judgment may be entered in the Clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the Clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or by his indorsement on the face, or on the margin of the record of the judgment, or by the attorney, unless a revocation of his authority is filed. Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment, or make such indorsement, and upon motion the court may compel it, or may order the entry of satisfaction to be made without it. [Amendment approved March 24, 1874; Amendments 1873-4, 675. In effect July 1, 1874.]

Acknowledgments.—Justices of the Supreme Court, Judges of district and county courts, Justices of the peace, police judges, and judges of municipal courts, have power within certain limits to take and certify acknowledgments of satisfaction of judgments: Sec. 179.

Attorney, power to bind client: Secs. 283-285.

TITLE IX.

ON THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

Chapter I. The execution.
II. Proceedings supplemental to the execution.

CHAPTER I.

THE EXECUTION.

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§ 685. Execution after five years.
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§ 692. Notice of sale under execution, how given.
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§ 699. Personal property not capable of manual delivery, how sold and delivered.
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§ 681. The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.

Time for execution: Sec. 664; when extended: Sec. 685.

Appeal, stay of execution: Secs. 942-945.

Arrest on mesne process: Sec. 478. Where money deposited by defendant, judgment is to be satisfied thereon by Clerk: Sec. 500.

Attachment.—If judgment plaintiff has attached property, the Sheriff must satisfy the judgment out of it: Sec. 550.

Executor or administrator.—No execution must issue upon judgment against, upon claims for money due from estate: Sec. 1504.

Receiver, in proceedings in aid of execution: Sec. 564, subd. 4.

Vessels, execution on judgment against: Sec. 825.

§ 682. The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the Clerk, and be directed to the Sheriff, and it must intelligibly refer to the judgment, stating the court, the county where the judgment-roll is filed, and if it be for money, the amount thereof, and the amount actually due thereon, and if made payable in a specified kind of money or currency, as provided in section six hundred and sixty-seven, the execution must also state the kind of money or currency in which the judgment is payable, and must require the Sheriff substantially as follows:

1. If it be against the property of the judgment debtor, it must require the Sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter; or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the Recorder of such county, stating such day, or any time thereafter;

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants, or trustees, it must require the Sheriff to satisfy the judgment, with interest, out of such property;

3. If it be against the person of the judgment debtor, it must require the Sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment with interest, or be discharged according to law;

4. If it be issued on a judgment made payable

in a specified kind of money or currency, as provided in section six hundred and sixty-seven, it must also require the Sheriff to satisfy the same in the kind of money or currency in which the judgment is made payable, and the Sheriff must refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor, he must refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution. The Sheriff, collecting money or currency in the manner required by this chapter, must pay to the plaintiff or party entitled to recover the same, the same kind of money or currency received by him, and in case of neglect or refusal so to do, he shall be liable on his official bond to the judgment creditor in three times the amount of the money so collected.

5. If it be for the delivery of the possession of real or personal property, it must require the Sheriff to deliver the possession of the same, describing it, to the party entitled thereto, and may, at the same time, require the Sheriff to satisfy any costs, damages, rents, or profits, recovered by the same judgment, out of the personal property of the person against whom it was rendered, and the value of the property for which the judgment was rendered to be specified therein if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section.

Contempt: Secs. 1209, 1210.

Subd. 4. Judgment payable in specified kind of money: See, ante, sec. 667.

§ 683. The execution may be made returnable, at any time not less than ten nor more than sixty

days after its receipt by the Sheriff, to the Clerk with whom the judgment-roll is filed. When the execution is returned the Clerk must attach it to the judgment-roll. If any real estate be levied upon, the Clerk must record the execution and the return thereto at large, and certify the same under his hand as true copies, in a book to be called the "execution book," which book must be indexed with the names of the plaintiffs and defendants in execution, alphabetically arranged, and kept open at all times during office hours for the inspection of the public without charge. It is evidence of the contents of the originals whenever they or any part thereof may be destroyed or mutilated.

§ 684. When the judgment is for money or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor, after the return of an execution against his property unsatisfied in whole or part. When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith. When the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court. [Amendment approved March 24, 1874; Amendments 1873-4, 321. In effect July 1, 1874.]

Writ of possession or restitution: Secs. 380, 1174.

Execution against the person; discharge of prisoner: Secs. 1143-1154.

Sale of property: See sec. 694 et seq.

Performance of any other act—Enforcing obedience: Sec. 1209 et seq.

§ 685. In all cases, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act. [Amendment approved March 9, 1895; Stats. 1895, 38. In effect March 9, 1895.]

§ 686. Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced as follows:

1. In case of the death of the judgment creditor, upon the application of his executor, or administrator, or successor in interest;

2. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon.

Death of party—effect on action: Sec. 385; judgment after: Sec. 669; execution after: Sec. 1503.

Real or personal property, recovery of: See sec. 682, subd. 5.

§ 687. Where the execution is against the property of the judgment debtor, it may be issued to the Sheriff of any county in the State. Where it requires the delivery of real or personal property, it must be issued to the Sheriff of the county

where the property, or some part thereof, is situated. Executions may be issued, at the same time, to different counties.

Any county, in the State, process extends to: Sec. 78.

Act concerning execution of final process where new county formed: See post, Appendix, p. 864.

§ 688. All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution.

Good will: Civ. Code, secs. 992, 993; franchise, Civ. Code, secs. 388-393.

Homestead: See Civ. Code, sec. 1241-1261; and as to sole traders, see secs. 1811-1822.

Levy: See sec. 542.

§ 689. If the property levied on be claimed by a third person as his property by a written claim verified by the oath of said claimant, setting out his title thereto, his right to the possession thereof, and stating the grounds of such title, and served upon the Sheriff, the Sheriff is not bound to keep the property unless the plaintiff, or the person in whose favor the writ of execution runs, on de-

mand, indemnify the Sheriff against such claim by an undertaking by at least two good and sufficient sureties; and no claim to such property is valid against the Sheriff, or shall be received, or be notice of any rights, unless made as above provided. [Amendment approved March 2, 1891; Stats. 1891, 20.].

If the Sheriff give notice to sureties of action brought against him, they are liable on the judgment: Sec. 1055.

§ 690. The following property is exempt from execution, except as herein otherwise specially provided:

1. Chairs, tables, desks, and books, to the value of two hundred dollars, belonging to the judgment debtor.

2. Necessary household, table, and kitchen furniture belonging to the judgment debtor, including one sewing machine, stove, stovepipes and furniture, wearing apparel, beds, bedding, and bedsteads, hanging pictures, oil paintings and drawings, drawn or painted by any member of the family, and family portraits and their necessary frames, provisions actually provided for individual or family use, sufficient for three months, and three cows and their sucking calves, four hogs with their sucking pigs, and food for such cows and hogs for one month; also, one piano, one shotgun, and one rifle;

3. The farming utensils or implements of husbandry of the judgment debtor, not exceeding in value the sum of one thousand dollars; also, two oxen, or two horses, or two mules, and their harness, one cart or wagon, and food for such oxen, horses, or mules, for one month; also, all seed, grain, or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing

at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars, and seventy-five bee-hives, and one horse and vehicle belonging to any person who is maimed or crippled, and the same is necessary in his business;

4. The tools or implements of a mechanic or artisan necessary to carry on his trade; the notarial seal, records, and office furniture of a notary public; the instruments and chest of a surgeon, physician, surveyor, or dentist, necessary to the exercise of their profession, with their professional libraries and necessary office furniture; the professional libraries of attorneys, judges, ministers of the gospel, editors, school teachers, and music teachers, and their necessary office furniture; also, the musical instruments of music teachers actually used by them in giving instructions, and all the indexes, abstracts, books, papers, maps, and office furniture of a searcher of records necessary to be used in his profession; also, the typewriters, or other mechanical contrivances employed for writing in type, actually used by the owner thereof for making his living; also, one bicycle, when the same is used by its owner for the purpose of carrying on his regular business, or when the same is used for the purpose of transporting the owner to and from his place of business;

5. The cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars; also, his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements, and appliances necessary for carrying on any mining operations, not exceeding in value the aggregate sum of five hundred dollars; and two horses, mules, or oxen, with their harness, and food for such horses, mules, or oxen for one month, when necessary to be used in any whim, windlass, derrick, car, pump,

or hoisting gear; and also his mining claim, actually worked by him, not exceeding in value the sum of one thousand dollars;

6. Two horses, two oxen, or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living, and one horse, with vehicle and harness or other equipments, used by a physician, surgeon, constable, or minister of the gospel, in the legitimate practice of his profession or business, with food for such oxen, horses, or mules for one month;

7. One fishing boat and net, not exceeding the total value of five hundred dollars, the property of any fisherman, by the lawful use of which he earns a livelihood;

8. Poultry not exceeding in value twenty-five dollars;

9. Seamen and sea-going fishermen's wages and earnings, not exceeding one hundred dollars;

10. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of his family, residing in this State, supported in whole or in part by his labor; but where debts are incurred by any such person, or his wife or family, for the common necessaries of life, or have been incurred at a time when the debtor had no family, residing in this State, supported in whole or in part by his labor, the one-half of such earnings above mentioned are nevertheless subject to execution, garnishment, or attachment to satisfy debts so incurred;

11. The shares held by a member of a homestead association duly incorporated, not exceeding in value one thousand dollars, if the person holding the shares is not the owner of a homestead under the laws of this State. All the nautical instruments and wearing apparel of any master, officer, or seaman of any steamer or other vessel;

12. All moneys, benefits, privileges, or immunities, accruing or in any manner growing out of any life insurance on the life of the debtor, if the annual premiums paid do not exceed five hundred dollars;

13. All fire engines, hooks and ladders, with the carts, trucks and carriages, hose, buckets, implements, and apparatus thereunto appertaining, and all furniture and uniforms of any fire company or department organized under any laws of this State;

14. All arms, uniforms, and accoutrements required by law to be kept by any person, and also one gun, to be selected by the debtor;

15. All courthouses, jails, public offices, and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the jail and public offices belonging to any county, or to any city and county of this State, and all cemeteries, public squares, parks, and places, public building, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned, or held by any town or incorporated city, or dedicated by such town or city to health, ornament, or public use, or for the use of any fire or military company organized under the laws of this State;

16. All material purchased in good faith for use in the construction, alteration, or repair of any

building, mining claim, or other improvement, as long as in good faith the same is about to be applied to the construction, alteration or repair of such building, mining claim, or other improvement;

No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage thereon. [Approved March 27, 1897; Stats. 1897, c. 120; Also amended in 1887; Stats. 1887, 99.]

§ 691. The Sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the Sheriff, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs. [Amendment approved March 24, 1874; Amendments 1873-4, 321. In effect July 1, 1874.]

Sheriff must execute writ: Polit. Code, sec. 4180.

Selling property: Sec. 694 et seq.

Paying over proceeds: Polit. Code, sec. 4181; labor claims: Sec. 1206.

Debts, payment of to Sheriff: Secs. 544, 716.

§ 692. Before the sale of property on execution, notice thereof must be given as follows:

1. In case of perishable property, by posting written notice of the time and place of sale in three public places of the township or city where the sale is to take place, for such time as may be reasonable, considering the character and condition of the property;

2. In case of other personal property, by posting a similar notice in three public places in the township or city where the sale is to take place, for not less than five nor more than ten days;

3. In case of real property, by posting a similar notice, particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof, once a week for the same period, in some newspaper published in the county, if there be one;

4. When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this section must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment. [Amendment approved March 24, 1874; Amendments 1873-4, 322. In effect July 1, 1874.]

Sale of vessels, notice of: Secs. 824, 827.

Sale without notice: See sec. 693.

Perishable property, sale under attachment: Sec. 547.

Specified kind of money: See sec. 682; subd. 4.

§ 693. An officer selling without the notice prescribed by the last section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages; and a person willfully taking down or defacing the notice posted, if done before

the sale or the satisfaction of the judgment (if the judgment be satisfied before sale), forfeits five hundred dollars.

§ 694. All sales of property under execution must be made at auction to the highest bidder, between the hours of nine in the morning and five in the afternoon. After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or, when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the Sheriff must follow such directions.

Auctioneer, Sheriff as: Polit. Code, sec. 3291.

§ 695. If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction. [Amendment approved March 24, 1874; Amendments 1873-4, 323. In effect July 1, 1874.]

§ 696. When a purchaser refuses to pay, the officer may, in his discretion, thereafter, reject any subsequent bid of such person. [Amendment approved March 24, 1874; Amendments 1873-4, 323. In effect July 1, 1874.]

§ 697. The two preceding sections must not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay.

§ 698. When the purchaser of any personal property, capable of manual delivery, pays the purchase money, the officer making the sale must deliver to the purchaser the property, and if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

Certificate of sale: See next section.

§ 699. When the purchaser of any personal property, not capable of manual delivery, pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

Attachment: Sec. 542.

§ 700. Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases, the property is subject

to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale, containing:

1. A particular description of the real property sold;

2. The price bid for each distinct lot or parcel;

3. The whole price paid;

4. When subject to redemption, it must be so stated.

And when the judgment under which the sale has been made, is made payable in a specified kind of money or currency, the certificate must also show the kind of money or currency, in which such redemption may be made, which must be the same as that specified in the judgment. A duplicate of such certificate must be filed by the officer in the office of the Recorder of the county.

Specified kind of money: Sec. 682, subd. 4.

Certificate, recording: Polit. Code, sec. 4237.

Sheriff's deed, and what passes by it: Sec. 703.

Injunction to restrain person in possession from waste: Sec. 745. Recovery of damages for waste: Sec. 746.

Writ of assistance. Sec. 1210.

§ 701. Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons, or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property;

2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.

Redemption, mode of: Sec. 702 et seq.
Judgment creditor, redemption by: Sec. 1505.
Parties entitled to redeem: Secs. 346, 347.

§ 702. The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within twelve months after the sale on paying the purchaser the amount of his purchase, with one per cent per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount. And if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which said purchase was made, the amount of such lien with interest. [Approved February 26, 1897; Stats. 1897, c. 44. In effect immediately; Also amended in 1895; Stats. 1895, 225.]

§ 703. If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner on paying the sum paid on such last redemption, with two per cent thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and, in addition, the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redemed from any previous redemptioner within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with two per cent thereon in addition, and the amounts

of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. Written notice of redemption must be given to the Sheriff and a duplicate filed with the Recorder of the county, and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the Sheriff and filed with the Recorder; and if such notice be not filed, the property may be redeemed without paying such tax, assessment, or lien. If no redemption be made within twelve months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a Sheriff's deed; but, in all cases, the judgment debtor shall have the entire period of twelve months from the date of the sale to redeem the property. If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the Recorder of the county in which the property is situated, and the Recorder must note the record

thereof in the margin of the record of the certificate of sale. [Approved February 26, 1897; Stats. 1897, c. 44; Also amended in 1895; Stats. 1895, 226.

Writ of assistance: See sec. 682, ante.
Certificate, recording: Polit. Code, sec. 4234.

§ 704. The payments mentioned in the last two sections may be made to the purchaser or redemptioner, or for him to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment.

Specified kind of money: See sec. 682, subd. 4.

§ 705. A redemptioner must produce to the officer or person, from whom he seeks to redeem, and serve with his notice to the Sheriff:

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the Clerk of the Court, or of the county where the judgment is docketed, or if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the recorder;

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto;

3. An affidavit by himself or his agent, showing the amount then actually due on the lien;

§ 706. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property

at the time of sale, or entitled to possession afterward, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor, or for the repair of fences, or for fuel in his family, while he occupies the property.

Waste: Secs. 745-746.

§ 707. The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption demands in writing of such purchaser or creditor, or his assigns a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right

of redemption is extended to such redemptioner or debtor.

§ 708. If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequences of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at Sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must, after notice and on motion of such party in interest, or his attorney, revive the original judgment in the name of the petitioner, for the amount paid by such purchaser at the sale, with interest thereon from the time of payment, at the same rate that the original judgment bore; and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more.

§ 709. When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal; in such case, the person so paying or contributing is entitled to the

benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he file with the Clerk of the Court where the judgment was rendered, notice of his payment and claim to contribution or repayment. Upon a filing of such notice, the Clerk must make an entry thereof in the margin of the docket.

CHAPTER II.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

§ 714. Debtor required to answer concerning his property, when.
§ 715. Proceedings to compel debtor to appear. In what cases he may be arrested. What bail may be given.
§ 716. Any debtor of the judgment debtor may pay the latter's creditor.
§ 717. Examination of debtors of judgment debtor, or of those having property belonging to him.
§ 718. Witnesses required to testify
§ 719. Judge may order property to be applied on execution.
§ 720. Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.
§ 721. Disobedience of orders, how punished.

§ 714. When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the Sheriff of the county where he resides, or if he do not reside in this State, to the Sheriff of the county where the judgment-roll is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a Judge of the court, requiring such judgment debtor to appear and answer concerning his property before such judge, or a referee appointed by him, at a time and place speci-

fied in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides. [Amendment approved March 9, 1880; Amendments 1880, 18. In effect March 9, 1880.]

Conduct of examination: Sec. 718.

Receiver, aiding proceedings: Sec. 564, subd. 4.

§ 715. After the issuing of an execution against property, and upon proof, by affidavit of a party or otherwise, to the satisfaction of a Judge of the court, that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge may, by an order, require the judgment debtor to appear, at a specified time and place, before such judge, or a referee appointed by him to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment, as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent, or attorney, if it appear to him that there is danger of the debtor absconding, order the Sheriff to arrest the debtor, and bring him before such Judge. Upon being brought before the Judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the Judge or referee, as may be directed during the pendency of proceedings and until the final termination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking he may be committed to prison. [Amendment approved March 9, 1880; Amendments 1880, 5. In effect March 9, 1880.]

Appear and answer: Sec. 718.

Application of property, of judgment debtor, to satisfaction of judgment: Sec. 719.

Arrest of debtor, as provisional remedy: Secs 478-504.

Discharge of persons imprisoned, on civil process: Secs. 1143-1154.

§ 716. After the issuing of an execution against property, and before its return, any person indebted to the judgment debtor may pay to the Sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the Sheriff's receipt is a sufficient discharge for the amount so paid.

Attachment: Compare sec. 544.

Receiver: Sec. 564.

§ 717. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, or upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same.

Share in deceased's estate: Sec. 1668.

Receiver: Sec. 564.

Referee: Sec. 714.

§ 718. Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under this chapter, in the same manner as upon the trial of an issue.

Witnesses, rights and duties of: Secs. 2064-2070.

§ 719. The judge or referee may order any property of a judgment debtor, not exempt from execution, in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment.

Exempt from execution: Sec. 690.
Wages, etc.: Sec. 1206.
Share in deceased's estate: Sec. 1668.

§ 720. If it appear that a person or corporation, alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just.

Receiver: Sec. 564.
Wages, etc.: Sec. 1206.

§ 721. If any person, party, or witness disobey an order of the referee, properly made, in the proceedings before him, under this chapter, he may be punished by the court or judge ordering the reference, for a contempt.

Contempt: Sec. 1209 et seq.

TITLE X.

ACTIONS IN PARTICULAR CASES.

Chapter I. Actions for the foreclosure of mortgages.
II. Actions for nuisance, waste, and willful trespass, in certain cases, on real property.
III. Actions to determine conflicting claims to real property, and other provisions relating to actions concerning real estate.
IV. Actions for the partition of real property.
V. Actions for the usurpation of an office or franchise.
VI. Of actions against steamers, vessels, and boats.

CHAPTER I.

ACTIONS FOR THE FORECLOSURE OF MORTGAGES.

§ 726. Proceedings in foreclosure suits.
§ 727. Surplus money to be deposited in court.
§ 728. Proceedings when debt secured falls due at different times.
§ 729. Oath and undertaking of commissioner.

§ 726. There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the encumbered property (or so much thereof as may be necessary), and the application of the

proceeds of the sale to the payment of the costs of court, and the expenses of the sale, and the amount due plaintiff. The court may, by its judgment, or at any time after judgment, appoint a commissioner to sell the encumbered property. If it appear from the Sheriff's return, or from the commissioner's report, that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases on which execution may be issued. No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been a party to the action. If the court appoint a commissioner for the sale of the property, he shall sell it in the manner provided by law for the sale of like property by the Sheriff upon execution; and the provisions of chapter one, title nine, part two, of the Code of Civil Procedure, are hereby made applicable to sales made by such commissioners, and the powers therein given and the duties therein imposed on Sheriffs are extended to such commissioners. In the event of the death, or absence from the State, or other disability or disqualification of the commissioner so appointed to sell encumbered property, the court may, after the time for redemption has expired, appoint an elisor to make the deed or deeds due to the purchaser or purchasers or his or their assigns, of the property

so sold by said commissioner. [Amendment approved March 26, 1895; Stats. 1895, 98. In effect March 26, 1895.]

This section was also amended in 1893; Stats. 1893, 118.

One action only: See sec. 744.

Assistance, writ of: See sec. 1210.

Mortgage, generally: See Civil Code, secs. 2920-2971; construction of, sec. 744; estate, against property of, secs. 1493, 1500, 1569, 1570; lis pendens: Sec. 409.

Act authorizing court to fix fee on foreclosure: See post, Appendix, 863.

Waste: Sec. 745.

Injunction to restrain waste by party in possession: Sec. 745.

Intervention, by wife of mortgagor or other party: Sec. 387.

Judgment: Sec. 664; by default, Sec. 585. Relief: Sec. 580.

Personal property, mortgage of.—A mortgagee of personal property, when the debt to secure which the mortgage was executed becomes due, may foreclose the mortgagor's right of redemption by a sale of the property, made in the manner and upon the notice prescribed by the title on "Pledge": Civ. Code, secs. 2986-3011; or by proceedings under the Code of Civil Procedure: Id., sec. 2967.

Place of trial: Sec. 392.

Pleading written document: Secs. 447-449.

Possession, mortgagee in: Sec. 744.

A mortgage given for the price or real property at the time of its conveyance has priority over all other liens created against the purchaser, subject to the operation of the recording laws: Civ. Code, sec. 2898.

Receiver: Sec. 564.

Several mortgages or debts, installments, etc.: Sec. 728.

Tender: Sec. 997, and notes.

§ 727. If there be surplus money remaining after payment of the amount due on the mortgage. lien, or incumbrance with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court.

Deposit in court: Secs. 573, 574, 2104.

§ 728. If the debt for which the mortgage, lien, or incumbrance is held, is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterward, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

§ 729. The commissioner, before entering upon his duties, must be sworn to perform them faithfully, and the court making the appointment shall require of him an undertaking, with sufficient sureties, to be approved by the court, in an amount to be fixed by the court, to the effect that he will faithfully perform the duties of commissioner, according to law. Within thirty days after such sale, the commissioner must file with the Clerk of the Court in which the action is pending a verified report and account of the sale, together with the proper affidavits, showing that the regular and required notice of the time and place of the sale

was given, which report and account shall have the same force and effect as the Sheriff's return in sales under execution. In all cases of sales made by a commissioner, the court in which the proceedings are pending shall fix a reasonable compensation for the commissioner's services, but in no case to exceed the sum of ten dollars. [New section added March 9, 1893; Stats. 1893, 119; in effect immediately.]

CHAPTER II.

ACTIONS FOR NUISANCE, WASTE, AND WILLFUL TRESPASS, IN CERTAIN CASES ON REAL PROPERTY.

§ 731. Nuisance defined, and actions for.
§ 732. Waste, actions for.
§ 733. Trespass for cutting or carrying off trees, etc., actions for.
§ 734. Measure of damages in certain cases under the last section.
§ 735. Damages in actions for forcible entry, etc., may be trebled.

§ 731. Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment, the nuisance may be enjoined or abated, as well as damages recovered.

Nuisance—definition, compare Civil Code, sec. 3479; also, see Civil Code, secs. 3482-3483, 3490; damages, Civil Code, sec. 3484.

Nuisance.—Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property,

so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use in the customary manner of any navigable lake, or river, or bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance: Civ. Code, sec. 3479. A public nuisance is one which affects, at the same time, an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal: Id., sec. 3480. Every nuisance not included in the definition of the last section is private: Id., sec. 3481. Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance: Id., sec. 3482. Every successive owner of property who neglects to abate a continuing nuisance upon or in the use of such property, created by a former owner, is liable therefor in the same manner as the one who first created it: Id., sec. 3483. The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence: Id., sec. 3484. No lapse of time can legalize a public nuisance amounting to an actual obstruction of public right: Id., sec. 3490. A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise: Id., sec. 3493. The statute does not take away any common-law remedy in the abatement of nuisances, but see sec. 18, ante.

§ 732. If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

Waste: See sec. 746; enjoining, see sec. 745.

§ 733. Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction.

§ 734. Nothing in the last section authorizes the recovery of more than the just value of the timber taken from uncultivated woodland, for the repair of a public highway or bridge upon the land, or adjoining it.

§ 735. If a person recover damages for a forcible or unlawful entry in or upon, or detention of, any building, or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

Forcible entry and unlawful detainer, treble damages, sec. 1174.

CHAPTER III.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE.

§ 738. Parties to an action to quiet title.
§ 739. When plaintiff cannot recover costs.
§ 740. If plaintiff's title terminates pending the suit, what he may recover, and how verdict and judgment to be.
§ 741. When value of improvements can be allowed as a setoff.
§ 742. An order may be made to allow a party to survey and measure the land in dispute.
§ 743. Order, what to contain, and how served. If unnecessary injury done, the party surveying to be liable therefor.
§ 744. A mortgage must not be deemed a conveyance, whatever its terms.
§ 745. When court may grant injunction; during foreclosure, after sale on execution, before conveyance.
§ 746. Damages may be recovered for injury to the possession after sale and before delivery of possession.
§ 747. Action not to be prejudiced by alienation, pending suit.
§ 748. Mining claims, actions concerning to be governed by local rules.
§ 789. How service may be made in action relating to real property.

§ 738. An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim; provided, however, that whenever in an action to quiet title to, or to determine adverse claims to, real property, the validity of any gift, devise, or trust, under any will, or instrument purporting to be a will, whether admitted to probate or not, shall be involved, such will, or instrument purporting to be a will, is admissible in evidence; and all questions concerning the validity of any gift, devise, or trust therein contained, save such as under the constitution be-

long exclusively to the probate jurisdiction, shall be finally determined in such action; and provided however, that nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given. [Amendment, approved March 26, 1895; Stats. 1895, 72. In effect immediately.]

Obligations, determining claim to: Sec. 1050.
Injunction: Sec. 526.
Parties: Secs. 372, 379, 380, 381.

§ 739. If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs.

Costs: Secs. 1022 et seq.

§ 740. In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property.

Pendency of action: Sec. 1049.

§ 741. When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a setoff against such damages.

Counterclaim.—Unless defendant sets it up, it is waived: See 439. Counterclaim generally: Sec. 438.

§ 742. The court in which an action is pending for the recovery of real property, or for damages for an injury thereto, or a judge thereof, may, on motion, on notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, and of any tunnels, shafts, or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to parties to the action. [Amendment, approved March 10, 1880; Amendments 1880, 11. In effect March 10, 1880.]

Orders, motions, etc: Sec. 1003 et seq.

§ 743. The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey and measurement; but if any unnecessary injury be done to the property, he is liable therefor.

§ 744. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale.

Conveyance deemed mortgage: Civil Code, sec. 2925; proof: Civil Code, sec. 2925; mortgagee's possession: Civil Code, sec. 2927.

§ 745. The court may by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or, after a sale on execution, before a conveyance.

Injunction, generally: Secs. 525-533.
Receiver: Sec. 564, subd. 2.

Waste: Civil Code, sec. 2929.
Foreclosure of mortgage: Sec. 726.
Execution sales: Sec. 694 et seq.

§ 746. When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale and before possession is delivered under the conveyance.

Lis pendens: Sec. 409.

§ 747. An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

§ 748. In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the laws of this State, must govern the decision of the action.

§ 749. Service may be made by publication in actions relating to or the subject of which is real property in this State, when any defendant has or claims any adverse interest or estate therein, and where the person on whom the service is to be made resides outside of the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier, or secretary within the State, and the fact appearing, by affidavit, to the satisfaction of the court or judge thereof, and it

also appearing by such affidavit or by the verified complaint on file that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such judge may make an order that the service be made by publication of summons. Service by publication and proof of service of a copy of the summons and complaint in actions under this title shall be sufficient, if made in accordance with sections four hundred and thirteen and four hundred and fifteen of this Code. [New section added March 31, 1891; Stats. 1891, 278.]

CHAPTER IV.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

§ 752. Who may bring actions for partition.
§ 753. Interests of all parties must be set forth in the complaint.
§ 754. Lien-holders not of record need not be made parties.
§ 755. Plaintiff must file notice of lis pendens.
§ 756. Summons must be addressed to all persons interested in the property.
§ 757. Unknown parties may be served by publication.
§ 758. Answer of defendants, what to contain.
§ 759. The rights of all parties may be ascertained in the action.
§ 760. Partial partition.
§ 761. Lien-holders must be made parties, or a referee be appointed to ascertain their rights.
§ 762. Lien-holders must be notified to appear before the referee appointed.
§ 763. The court may order a sale or partition, and appoint referees therefor.
§ 734. Partition must be made according to the rights of the parties, as determined by the court.
§ 765. Referees must make a report of their proceedings.
§ 763. The court may set aside or affirm report, and enter judgment thereon. Upon whom judgment to be conclusive.
§ 767. Judgment not to affect tenants for years to the whole property.
§ 768. Expenses of partition must be apportioned among the parties.
§ 769. A lien on an undivided interest of any party is a charge only on the share assigned to such party.
§ 770. Estate for life or years may be set off in a part of the property not sold, when not all sold.
§ 771. Application of proceeds of sale of incumbered property.
§ 772. Party holding other securities may be required first to exhaust them.
§ 773. Proceeds of sale, disposition of.
§ 774. When paid into court, the cause may be continued for the determination of the claims of the parties.
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§ 777. Referees may take securities for purchase money.
§ 778. Tenants whose estate has been sold shall receive compensation.

§ 779. The court may fix such compensation.
§ 780. The court must protect tenants unknown.
§ 781. The court must ascertain and secure the value of future contingent or vested interests.
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§ 791. Duties of the clerk making investments.
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§ 793. The share of an infant may be paid to his guardian.
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§ 795. A guardian may consent to partition without action, and execute releases.
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§ 797. The court, by consent, may appoint a single referee.
§ 798. Expenses of previous litigation for common benefit allowed.
§ 799. Abstract of title in action for partition—when cost of allowed.
§ 800. Abstract, how made and verified.
§ 801. Interest allowed on disbursements made under direction of the court.

§ **752.** When several cotenants hold and are in possession of real property as parceners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners.

Partition of easements: Civ. Code, sec. 807.
Parties: Secs. 367-389.
Intervention: Sec. 387.

§ 753. The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.

Complaint in partition—complaint generally: Sec. 426; parties, sec. 754; secs. 384, 387; and generally, secs. 367-389. Unknown persons, use of fictitious names, sec. 474; and as to summons: See sec. 756.
Abstract of title—procured before suit: Sec. 799.

§ 754. No person having a conveyance of or claiming a lien on the property, or some part of it, need be made a party to the action, unless such conveyance or lien appear of record.

§ 755. Immediately after filing the complaint in the Superior Court, the plaintiff must record in the office of the recorder of the county or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record, all persons shall be deemed to have notice of the pendency of the action. [Amendment, approved March 9, 1880; Amendments 1880, 11. In effect March 10, 1880.]

Lis pendens: Sec. 409.

§ 756. The summons must be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment, or otherwise, upon the property, or upon any particular portion thereof; and generally, to all persons unknown who have or claim any interest in the property.

Summons in partition—generally: Secs. 405-416; and as to contents, see sec. 407.

§ 757. If a party having a share or interest is unknown, or any one of the known parties reside out of the State, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

Service by publication: Secs. 412, 413.

§ 758. The defendants who have been personally served with the summons and a copy of the complaint, or who have appeared without such service, must set forth in their answers, fully and particularly, the origin, nature, and extent of their respective interests in the property; and if such defendants claim a lien on the property by mortgage, judgment, or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon; also whether the same has been secured in any other way or not; and, if secured, the nature and extent of such security, or they are deemed to have waived their right to such lien.

Answer in partition—pleading disbursements: Sec. 798; answer generally: Sec. 437.

Notice, as to abstract of title: Sec. 799.

§ 759. The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; and where service of the complaint has been made by publication, like proof must be required of the right of the absent or unknown parties, before such judgment is rendered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.

Final judgment: Sec. 766.
Parties: Sec. 367 et seq.; Sec. 761.
Intervention: Sec. 387.

§ 760. Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interest respectively held by the original cotenants, and thereupon adjudge and cause a partition to be made, as if such original cotenants were the parties and sole parties in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire.

§ 761. If it appears to the court, by the certificate of the county recorder or county clerk, or by the sworn or verified statement of any person who

may have examined or searched the records, that there are outstanding liens or incumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action, by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or incumbrances have been paid, or if not paid, what amount remains due thereon, and their order among the liens or incumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security.

§ 762. The plaintiff must cause a notice to be served, a reasonable time previous to the day for appearance before the referee appointed as provided in the last section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the amount due or to become due contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication, or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require.

§ 763. If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint to

the satisfaction of the court, that the property or any part of it is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof; otherwise, upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained; provided, that when the site of an incorporate city or town is included within the exterior boundaries of the property to be partitioned, then, on said fact being established by evidence, the following proceedings shall be had: The court shall thereupon direct the referees to survey and appraise the entire property to be partitioned by actual lots and subdivisions then existing in the actual possession of the several tenants in common, exclusive of the value of improvements thereon, first setting apart necessary portions of the property for ways, roads, and streets, as in section seven hundred and sixty-four of this Code provided, and to report such survey and separate appraisement on each lot and subdivision to the court. The court may confirm, change, modify, or set aside the report in whole or in part, and if necessary appoint new referees. When, after the final confirmation of the report of such survey and appraisement, it shall appear by evidence to the satisfaction of the court that an equitable partition of the whole property is impracticable, and a sale of the site of such city or town, or any portion thereof, will be for the best interests of the owners of the whole property, it shall order a sale thereof; provided, that within sixty days thereafter any tenant in common, or tenants in common, having improvements erected on any town or city lot or subdivision included in such

order of sale, shall have the prior right to purchase the same at such appraised valuation, and may pay into court the amount so appraised as the value thereof, and upon such payment the title shall vest in such purchaser or purchasers, and the court shall cause to be executed by said referees a deed for such lot or subdivision in fee and in severalty to such purchaser or purchasers; such further proceedings shall then be had as to the remainder of the property, and the money so paid to the court, as by this chapter provided. If, during the pendency of the action, any of the parties die, or become insane or otherwise incompetent, the proceedings shall not for that cause be delayed or suspended, but the attorney who has appeared for such party may continue to represent such interest; and in case any such party has not appeared by an attorney, the court shall appoint an attorney to represent the interest which was held by such party, until his heirs or legal representatives, or successors in interest, shall have appeared in the action; and an attorney so appointed shall be allowed by the court a reasonable compensation for his services, which may be taxed as costs against the share or interest represented by such attorney, and may be adjudged a lien thereon, in the discretion of the court. [Amendment approved April 12, 1880; Amendments 1880, p. 59. In effect April 12, 1880.]

Sale, order of: Secs. 770-795.

Easements.—The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement: Civ. Code, sec. 803. In case of partition of the dominant tenement, the burden must be apportioned according to the division of the dominant tenement, but not in such a way as to increase the burden upon the servient tenement: Id., sec. 807.

Referees: See sec. 797.
Modifying decree: See sec. 766.

§ 764. In making partition, the referees must divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them. Before making partition or sale, the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart shall not be assigned to any of the parties or sold, but shall remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way. Whenever the referees have laid out on any tract of land roads sufficient in the judgment of said referees to accommodate the public and private wants, they shall report that fact to the court, and upon the confirmation of their report all other roads on said tract shall cease to be public highways. Whenever it shall appear, in an action for partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his

heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury of the rights and interests of the other cotenants who may not have joined in such conveyance; provided, that in all cases the court shall direct the referees, in making partition of land, to allot the share of each of the parties owning an interest in the whole or in any part of the premises sought to be partitioned, and to locate the share of each cotenant, so as to embrace as far as practicable the improvements made by such cotenant upon the property, and the value of the improvements made by the tenants in common must be excluded from the valuation in making allotments, and the land must be valued without regard to such improvement, in case the same can be done without material injury to the rights and interests of the other tenants in common owning such land. [Amendment approved April 3, 1876; Amendments 1875-6, p. 96. In effect sixty days after passage.]

§ 765. The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share.

§ 766. The court may confirm, change, modify, or set aside the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or

any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

2. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication;

3. On all other persons claiming from such parties or persons, or either of them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent, as if it had been entered before his death.

§ 767. The judgment does not affect tenants for years less than ten, to the whole of the property which is the subject of the partition.

§ 768. The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court, in its discretion, to the referees, must be apportioned among the different parties to the action, equitably.

Fees of referees: See sec. 1028.

Section 280 of the old Practice Act, which came to be sec. 768 of the Code of Civil Procedure, was amended during the session of 1871-72, and amendments of that session superseded the Codes, as follows:

The expenses of the referees, including those of

a surveyor and his assistant when employed, shall be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by law to the referees, and such attorney's fees expended for the common benefit, both for plaintiff and defendants, as the Court shall deem just and proper, shall be apportioned among the different parties to the action. [Amendment of March 4th, 1872. Stat. 1871-72, p. 230.]

§ 769. When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share must be first charged with its just proportion of the costs of the partition, in preference to such lien.

§ 770. When a part of the property only is ordered to be sold, if there be an estate for life or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

§ 771. The proceeds of the sale of incumbered property must be applied under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action;
2. To pay the costs of the reference;
3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment;
4. The residue among the owners of the property sold, according to their respective shares therein.

§ 772. Whenever any party to an action who holds a lien upon the property, or any part thereof, has other securities for the payment of the

amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property, on account thereof.

§ 773. The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into court, or deposited therein, or as directed by the court.

Deposit in court: Secs. 572-574, 2102.

§ 774. When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties, for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings, as in an original action.

§ 775. All sales of real property, made by referees under this chapter, must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property or any part of it is to be sold subject to a prior estate, charge, or lien, that must be stated in the notice.

Terms, distinct lots: Sec. 782.

Notice of execution sales: Secs. 692, 693; proceedings, sec. 694 et seq.

§ 776. The court must, in the order for sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the State.

§ 777. The referees may take separate mortgages and other securities for the whole, or convenient portions of the purchase money, of such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant; and for other shares, in the name of the clerk of the county and his successors in office.

§ 778. The person entitled to a tenancy for life, or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk must enter the same in the minutes of the court.

§ 779. If such consent be not given, filed, and entered, as provided in the last section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate; and must order the same to be paid to such party, or deposited in court for him, as the case may require.

§ 780. If the persons entitled to such estate for

life or years be unknown, the court must provide for the protection of their rights, in the same manner, as far as may be, as if they were known and had appeared.

§ 781. In all cases of sales, when it appears that any person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties.

§ 782. In all cases of sales of property the terms must be made known at the time; and if the premises consist of distinct farms or lots, they must be sold separately.

§ 783. Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void.

§ 784. After completing a sale of the property, or any part thereof ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the county where the property is situated.

§ 785. If the sale be confirmed by the court, an order must be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to

do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

§ 786. When a party entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

§ 787. The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action. [Amendment approved March 24, 1874; Amendments 1873-4, p. 326. In effect July 1, 1874.]

§ 788. When there are proceeds of a sale belonging to an unknown owner, or to a person without the State, who has no legal representative within it, the same must be invested in bonds of this State or of the United States, for the benefit of the persons entitled thereto.

§ 789. When the security of the proceeds of sale is taken, or when an investment of any such proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the county where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court.

§ 790. When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing, under their

hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled; or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of, and payable to, the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be returned and filed with the clerk.

§ 791. The clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must deposit with the county treasurer all securities taken, and keep an account in a book provided and kept for that purpose, in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

Deposit in court: Secs. 572-574, 2104.

§ 792. When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases, the court has power to make compensatory adjustment between the respective parties, according to the ordinary principles of equity.

Deposit in court: Secs. 573, 2104.

§ **793.** When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale, to his general guardian or the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court.

General guardian: Secs. 1747-1809.

Guardian ad litem, generally: Secs. 372, 373; in partition, limited powers, 19 Cal. 210.

§ **794.** The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive, in behalf of such person, his share of the proceeds of such real property from the referees, on executing, with sufficient sureties, an undertaking, approved by a judge of the court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative. [Amendment approved March 10, 1880; Amendments 1880, 11. In effect March 10, 1880.]

§ **795.** The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant or other person entitled, and may execute a release, in his behalf, to the owners of the shares, of the parts to which

they may be respectively entitled, upon an order of the court.

§ 796. The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case, they shall be a lien on the several shares, and the judgment may be enforced, by execution, against such shares, and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them. [Amendment approved March, 24, 1874; Amendments, 1873-4, 326. In effect July 1, 1874.]

Referees' fees, etc.: Sec. 678; sec. 1028.

§ 797. The court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this chapter; and the single referee, when thus appointed, has all the powers and may perform all the duties required of the three referees.

Referees: See sec. 763, ante.

§ 798. If it appear that other actions or proceedings have been necessarily prosecuted or defended by any one of the tenants in common, for the protection, confirmation, or perfecting of the title, or setting the boundaries, or making a survey or surveys of the estate partitioned, the court shall allow to the parties to the action who have paid the expense of such litigation or other pro-

ceedings, all the expenses necessarily incurred therein, except counsel fees, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making the said expenditures, and in the same kind of money expended or paid, and the same must be pleaded and allowed by the court and included in the final judgment, and shall be a lien upon the share of each tenant, respectively, in proportion to his interest, and shall be enforced in the same manner as taxable costs of partition are taxed and collected. [New section approved February 4, 1876; Amendments 1875-6, 97. Approved February 4, 1876.]

Section 798, as originally passed, was repealed by act approved March 24, 1874; Amendments 1873-4, 326; took effect July 1, 1874. In was afterwards, by act of February 4, 1876, Amendments 1875-6, 97, substantially re-enacted in the above. This section, as originally framed, and the three following sections, were added by the act of April 1, 1872.

§ 799. If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned, and such abstract shall have been procured by the plaintiff, or if the plaintiff shall have failed to have the same made before the commencement of the action, and any one of the defendants shall have had such abstract afterward made, the cost of the abstract, with interest thereon from the time the same is subject to the inspection of the respective parties to the action, must be allowed and taxed. Whenever such abstract is produced [procured?] by the plaintiff, before the commencement of the action, he must file with his complaint a notice that an abstract of the title has been made, and is subject

to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. But if the plaintiff shall have failed to procure such abstract before commencing the action, and any defendant shall procure the same to be made, he shall, as soon as he has directed it to be made, file a notice thereof in the action, with the Clerk of the Court, stating who is making the same and where it will be kept when finished. The court or the judge thereof may direct, from time to time, during the progress of the action, who shall have the custody of the abstract.

§ 800. The abstract mentioned in the last preceding section may be made by any competent searcher of records, and need not be certified by the recorder or other offices, but instead thereof, it must be verified by the affidavit of the person making it, to the effect that he believes it to be correct; but the same may be corrected, from time to time, if found incorrect, under the direction of the court.

§ 801. Whenever, during the progress of the action for partition, any disbursements shall have been made, under the direction of the court, or the judge thereof, by a party thereto, interest must be allowed thereon from the time of making such disbursements.

CHAPTER V.

ACTIONS FOR THE USURPATION OF AN OFFICE OR FRANCHISE.

§ 802. Certain writs abolished.
§ 803. Action may be brought against any party usurping, etc., any office or franchise.
§ 804. Name of person entitled to office may be set forth in the complaint. If fees have been received by the usurper, he may be arrested.
§ 805. Judgment may determine the rights of both incumbent and claimant.
§ 806. When rendered in favor of applicant.
§ 807. Damages may be recovered by successful applicant.
§ 808. When several persons claim the same office, their rights may be determined by a single action.
§ 809. If defendant found guilty, what judgment to be rendered against him.
§ 810. Undertaking when action brought upon information of private property.

§ 802. The writ of scire facias is abolished. [Amendment approved March 10, 1880; Amendments 1880, 11. In effect March 10, 1880.]

Corporations, dissolution of.—By the Civil Code, secs. 399, 400, it is declared that the dissolution of corporations is provided for, if involuntary, by this chapter of this Code; if voluntary, by part 3, title 6, secs. 1227-1233 of this Code; and that unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation. As to a receiver, see sec. 565.

§ 803. An action may be brought by the Attorney General, in the name of the people of this State, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exer-

cises any public office, civil or military, or any franchise within this State. And the Attorney General must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the Governor.

Complaint: Sec. 804; security by relator: Sec. 810.

Franchise—Civil Code, sec. 358; dissolution of corporations, Civil Code, secs. 399, 400.

Quo warranto, writ of: See sec. 76, subd. 5, ante.

Security by relator: Sec. 810.

Office, title to.—Contesting elections: Secs. 1111-1127.

Mandamus: Sec. 1085.

§ 804. Whenever such action is brought, the Attorney General, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a Justice of the Supreme Court, or a judge of the Superior Court, for the arrest of such defendant and holding him to bail; and thereupon he may be arrested and held to bail in the same manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest. [Amendment approved March 10, 1880; Amendments 1880, 11. In effect March 10, 1880.]

Action—where several claimants: Sec. 808.

Arrest and bail: Sec. 478 et seq.

§ 805. In every such action, judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice may require.

Judgment: Sec. 809.
New trial: Sec. 1111 et seq.

§ 806. If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he will be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office.

§ 807. If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he may have sustained by reason of the usurpation of the office by the defendant.

Costs and fine: Sec. 809.

§ 808. When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

§ 809. When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise, or privilege, judgment must be rendered that such defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The court may also, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars, which fine, when collected, must be paid into the treasury of the State.

§ 810. When the action is brought upon the information or application of a private party, the Attorney General may require such party to enter into an undertaking, with sureties to be approved by the Attorney General, conditioned that such party or the sureties will pay any judgment for costs or damages recovered against the plaintiff, and all the costs and expenses incurred in the prosecution of the action. [New section approved March 24, 1874; Amendments 1873-4, 326. In effect July 1, 1874.]

CHAPTER VI.

OF ACTIONS AGAINST STEAMERS, VESSELS, AND BOATS.

§ 813. When vessels, etc., are liable. Their liabilities constitute liens.
§ 814. Actions may be brought directly against such vessels, etc.
§ 815. Complaint must be verified.
§ 816. Summons may be served on the master, mate, etc.
§ 817. Plaintiff may have such vessel, etc., attached.
§ 818. The clerk must issue the writ of attachment.
§ 819. Such writ must be directed to the sheriff. Sheriff may release upon sufficient undertaking.
§ 820. Sheriff must execute such writ without delay.
§ 821. The owner, master, etc., may appear and defend such vessel.
§ 822. Proceedings in actions under this chapter.
§ 823. After appearance, attachment may, on motion, be discharged.
§ 824. When not discharged such vessel, etc., may be sold at public auction. Application of proceeds.
§ 825. Mariners and others may assert their claim for wages, notwithstanding prior attachment. How enforced.
§ 826. Proof of the claims of mariners and others.
§ 827. Sheriff's notice of sale to contain measurement, tonnage, etc.

§ 813. All steamers, vessels, and boats are liable:

1. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees;

2. For supplies furnished in this State for their use, at the request of their respective owners, masters, agents, or consignees;

3. For work done or materials furnished in this State for their construction, repair, or equipment;

4. For their wharfage and anchorage within this State;

5. For nonperformance, or malperformance, of any contract for the transportation of persons or property between places within the State, made by their respective owners, masters, agents, or consignees;

6. For injuries committed by them to persons or property in this State.

Demands for these several causes constitute liens upon all steamers, vessels and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued. [Amendment approved March 24, 1874; Amendments 1873-4, 327. In effect July 1, 1874.]

Seamen's wages: Sec. 114.

Salvage, Civil Code, sec. 2079.

Preference over all other demands, as to labor claims: See secs. 1204-1206.

Liens, generally: Sec. 1180.

Justices of the peace have not jurisdiction where the suit on proceeding is for the recovery of seamen's wages for a voyage performed, in whole or in part, without the waters of this State: Sec. 115, subd. 2.

§ 814. Actions for any of the causes specified in the preceding section must be brought against

the owners by name, if known, but if not known, that fact shall be stated in the complaint, and the defendants shall be designated as unknown owners. Other persons having a lien upon the vessel may be made defendants in the action, the nature and amount of such lien being stated in the complaint. [Amendment approved March 24, 1874; Amendments 1873-4, 328. In effect July 1, 1874.]

Unknown owners—fictitious designation of: Sec. 474.

Parties, generally: Sec. 367 et seq.

§ 815. The complaint must designate the steamer, vessel, or boat by name, and must be verified by the oath of the plaintiff, or some one on his behalf.

Verification of pleadings: Sec. 446.

§ 816. The summons and copy of the complaint must be served on the owners if they can be found; otherwise, they may be served on the master, mate, or person having charge of the steamer, vessel or boat. [Amendment approved March 10, 1880; Amendments 1880, 12. In effect March 10, 1880.]

Service of summons, generally: Sec. 410 et seq.

§ 817. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the steamer, vessel, or boat, with its tackle, apparel, and furniture, attached as security for the satisfaction of any judgment that may be recovered in the action. [Amendment approved March 24, 1874; Amendments 1873-4, 328. In effect July 1, 1874.]

Attachment generally: Sec. 537 et seq.

§ 818. The Clerk of the Court must issue a writ of attachment on the application of the plain-

tiff, upon receiving a written undertaking on behalf of the plaintiff, executed by two or more sufficient sureties, to the effect that if the judgment be rendered in favor of the owner of the steamer, vessel, or boat, as the case may be, he will pay all costs and damages that may be awarded against him, or all damages that may be sustained by him from the attachment, not exceeding the sum specified in the undertaking, which shall in no case be less than five hundred dollars. [Amendment approved March 24, 1874; Amendments 1874, 328. In effect July 1, 1874.]

Attachment bond, generally, compare sec. 539.
Qualifications of sureties: Sec. 1057.

§ 819. The writ must be directed to the Sheriff of the county within which the steamer, vessel, or boat lies, and direct him to attach such steamer, vessel, or boat, with its tackle, apparel, and furniture, and keep the same in his custody until discharged in due course of law. [Amendment approved March 24, 1874; Amendments 1873-4, 329. In effect July 1, 1874.]

§ 820. The Sheriff to whom the writ is directed and delivered must execute it without delay, and must attach and keep in his custody the steamer, vessel, or boat named therein, with its tackle, apparel, and furniture, until discharged in due course of law; but the Sheriff is not authorized by any such writ to interfere with the discharge of any merchandise on board of such steamer, vessel, or boat, or with the removal of any trunks or other property of passengers, or of the captain, mate, seamen, steward, cook, or other persons employed on board. [Amendment approved March 24, 1874; Amendments 1873-4, 329. In effect July 1, 1874.]

§ 821. The owner, or the master, agent, or consignee of the steamer, vessel, or boat, may, on behalf of the owner, appear and answer, or plead to the action; and may except to the sufficiency of the sureties on the undertaking filed on behalf of the plaintiff, and may require sureties to justify, as upon bail on arrest. [Amendment approved March 24, 1874; Amendments 1873-4, 329. In effect July 1, 1874.]

Appearance: Sec. 1014.
Answer: Sec. 437.
Justification of sureties: Sec. 495.

§ 822. After the attachment is levied, the owner, or the master, agent, or consignee of the steamer, vessel, or boat, may, on behalf of the owner, have the attachment discharged, upon giving to the Sheriff an undertaking of at least two sufficient sureties in an amount sufficient to satisfy the demand in suit, besides costs, or depositing that amount with the Sheriff. Upon receiving such undertaking or amount, the Sheriff must restore to the owner, or the master, agent, or consignee of the owner, the steamer, vessel, or boat attached. [Amendment approved March 24, 1874; Amendments 1873-4, 330. In effect July 1, 1874.]

Compare sec. 540; undertakings, see sec. 818n.

§ 823. After the appearance in the action of the owner, the attachment may, on motion, also be discharged, in the same manner, and on like terms and conditions, as attachments in other cases, subject to the provisions of sec. 825. [Amendment approved March 24, 1874; Amendments 1873-4, 330. In effect July 1, 1874.]

Discharge of attachment: Secs. 554-558.

§ 824. If the attachment be not discharged, and a judgment be recovered in the action in favor of

the plaintiff, and an execution be issued thereon, the Sheriff must sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel, or boat, with its tackle, apparel, and furniture, or such interest therein as may be necessary, and must apply the proceeds of the sale as follows:

1. When the action is brought for demands other than the wages of mariners, boatmen, and others employed in the service of the steamer, vessel, or boat sold, to the payment of the amount of such wages, as specified in the execution;

2. To the payment of the judgment and costs, including his fees;

3. He must pay any balance remaining to the owner, or to the master, agent, or consignee, who may have appeared on behalf of the owner, of if there be no appearance, then into court, subject to the claim of any party or parties legally entitled thereto. [Amendment approved March 24, 1874; Amendments 1873-4, 330. In effect July 1, 1874.]

Sale on execution, generally: Sec. 694 et seq.

Payment into court: Secs. 572-574, 2104.

§ 825. Any mariner, boatman, or other person employed in the service of the steamer, vessel, or boat attached, who may wish to assert his claim for wages against the same, the attachments being issued for other demands than such wages, may file an affidavit of his claim, setting forth the amount and the particular service rendered, with the Clerk of the Court, and thereafter no attachment can be discharged upon filing an undertaking, unless the amount of such claim, or the amount determined as provided in the next section, be covered thereby, in addition to the other requirements; and any execution issued against such steamer, vessel, or boat, upon judgment re-

covered thereafter, must direct the application of the proceeds of any sale:

1. To the payment of the amount of such claims filed, or the amount determined as provided in the next section, which amount the Clerk must insert in the writ;

2. To the payment of the judgment and costs and Sheriff's fees; and must direct the payment of any balance to the owner, master, or consignee who may have appeared in the action; but if no appearance by them be made therein, it must direct a deposit of the balance in court.

Preferred claims, for wages, etc.: Secs. 1204-1206.

Deposit in court: Secs. 572 et seq., 2104.

§ 826. If the claim of the mariner, boatman, or other person, filed with the Clerk of the Court, as provided in the last section, be not contested within five days after notice of the filing thereof by the owner, master, agent, or consignee of the steamer, vessel, or boat against which the claim is filed, or by any creditor, it shall be deemed admitted; but if contested, the Clerk must indorse upon the affidavit thereof a statement that it is contested, and the grounds of the contest, and must immediately thereafter order the matter to a single referee for his determination, or he may hear the proofs and determine the matter himself. The judgment of the Clerk or referee may be reviewed by a court in which the action is pending, or a judge thereof, immediately after the same is given, and the judgment of the court or judge shall be final. On the review, the court or judge may use the minutes of the proofs taken by the clerk or referee, or may take the proofs anew. [Amendment approved March 10, 1880; Amendments 1880, 12. In effect March 10, 1880.]

§ 827. The notice of sale published by the Sheriff must contain a statement of the measurement and tonnage of the steamer, vessel, or boat, and a general description of her condition.

TITLE XI.

OF PROCEEDINGS IN JUSTICES' COURTS.

Chapter I. Place of trial of actions in Justices' Courts.
II. Manner of commencing actions in Justices' Courts.
III. Pleadings in Justices' Courts.
IV. Provisional remedies in Justices' Courts.
V. Judgment by default in Justices' Courts.
VI. Time of trial and postponements in Justices' Courts.
VII. Trials in Justices' Courts.
VIII. Judgments (other than by default) in Justices' Courts.
IX. Executions from Justices' Courts.
X. Contempts in Justices' Courts.
XI. Dockets of justices.
XII. General provisions relating to Justices' Courts.

CHAPTER I.

PLACE OF TRIAL OF ACTIONS IN JUSTICES' COURTS.

§ 832. Actions, in what township or city may be commenced.
§ 833. Place of trial may be changed in certain cases.
§ 834. Limitation on the right to change.
§ 835. To what court transferred.
§ 836. Proceedings after order changing place of trial.
§ 837. Effect of an order changing place of trial.
§ 838. Transfer of cases to the District Court.

§ 832. Actions in Justices' Courts must be commenced, and, subject to the right to change the

place of trial, as in this chapter provided, must be tried:

1. If there be no justices' court for the township or city in which the defendant resides—in any city or township of the county in which he resides;

2. When two or more persons are jointly, or jointly and severally, bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county, or in different counties—in the township or city in which any of the persons liable may reside;

3. In cases of injury to the person or property—in the township or city where the injury was committed, or where the defendant resides;

4. If for the recovery of personal property, or the value thereof, or damages for taking or detaining the same—in the township or city in which the property may be found, or in which the property was taken, or in which the defendant resides;

5. When the defendant is a nonresident of the county—in any township or city wherein he may be found;

6. When the defendant is a nonresident of the State—in any township or city in the State;

7. When a person has contracted to perform an obligation at a particular place, and resides in another county, township, or city—in the township or city in which such obligation is to be performed, or in which he resides; and the township or city in which the obligation is incurred shall be deemed to be the township or city in which it is to be performed, unless there is a special contract to the contrary;

8. When the parties voluntarily appear and plead without summons—in any township or city in the State;

9. In all other cases—in the township or city in which the defendant resides. [Amendment approved March 24, 1874; Amendments 1873-4, 331. In effect July 1, 1874.]

Jurisdiction of Justices' Courts: Secs. 112-115, 925.

§ 833. The court may, at any time before the trial, on motion, change the place of trial in the following cases:

1. When it appears to the satisfaction of the justice before whom the action is pending, by affidavit of either party, that such justice is a material witness for either party;

2. When either party makes and files an affidavit that he believes that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice, or bias of the justice;

3. When a jury has been demanded, and either party makes and files an affidavit that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township or city against him;

4. When, from any cause, the justice is disqualified from acting;

5. When the justice is sick or unable to act.

Change of venue, generally: Sec. 397 et seq.

§ 834. The place of trial cannot be changed, on motion of the same party, more than once, upon any or all the grounds specified in the first, second, and third subdivisions of the preceding section.

§ 835. When the court orders the place of trial to be changed, the action must be transferred for trial to a court the parties may agree upon; and if they do not so agree, then to another justices' court in the same county.

§ 836. After an order has been made, transferring the action for trial to another court, the following proceedings must be had:

1. The justice ordering the transfer must immediately transmit to the justice of the court to which it is transferred, on payment by the party applying of all the costs that have accrued, all the papers in the action, together with a certified transcript from his docket of the proceedings therein;

2. Upon the receipt by him of such papers, the justice of the court to which the case is transferred must issue a notice, stating when and where the trial will take place, which notice must be served upon the parties at least one day before the time fixed for trial.

§ 837. From the time the order changing the place of trial is made the court to which the action is thereby transferred has the same jurisdiction over it as though it had been commenced in such court.

§ 838. The parties to an action in a justices' court cannot give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, nor can any issue presenting such question be tried by such court; and if it appear, from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property, or the legality of any tax, impost, assessment, toll, or municipal fine, the justice must suspend all further proceedings in the action and certify the pleadings, and, if any of the pleadings are oral, a transcript of the same, from his docket to the Clerk of the Superior Court of the county; and from the time of filing

such pleadings or transcript with the clerk, the Superior Court shall have over the action the same jurisdiction as if it had been commenced therein; provided, that in cases of forcible entry and detainer, of which justices' courts have jurisdiction, any evidence, otherwise competent, may be given, and any question properly involved therein may be determined. [Amendment approved March 26, 1880; Amendments 1880, 18. In effect March 26, 1880.]

Certifying to Superior Court, from justices' courts in cities and counties: See sec. 92.

Title or possession of realty involved. See sec. 112, subd. 2.

Legality of tax, etc., involved: See sec. 112, subd. 4.

Forcible entry and detainer, jurisdiction of: Sec. 113, subd. 1.

CHAPTER II.

MANNER OF COMMENCING ACTIONS IN JUSTICES' COURTS.

§ 839. Actions, how commenced.
§ 840. Summons may issue within a year.
§ 841. Defendant may waive summons.
§ 842. Parties may appear in person or by attorney.
§ 843. When guardian necessary, how appointed.
§ 844. Summons, how issued, directed, and what to contain.
§ 845. Time for appearance of defendant.
§ 846. Alias summons.
§ 847. Same.
§ 848. Summons, limitation upon time of service.
§ 849. Summons, by whom and how served and returned.
§ 850. Hour for appearance.

§ 839. An action in a justice's court is commenced by filing a complaint. [Amendment approved March 11, 1876; Amendments 1875-6, 98. In effect March 11, 1876.]

Actions, in cities and counties, title, etc.: Sec. 89.
Commencement of action.—Section 350, limitations, and sec. 405, commencement of action in other courts, correspond with this section, as amended. Action, when pending: Sec. 1049.
Complaint generally: Sec. 426.
Justices' courts: See secs. 85, ante et seq.
Fees payable in advance: Sec. 91, ante.

§ 840. The court must indorse on the complaint the date upon which it was filed, and at any time within one year thereafter the plaintiff may have summons issued.

Issuance of summons, generally: Sec. 406.
Payment of fees, in cities and counties: Sec. 91.

§ 841. At any time after the complaint is filed, the defendant may, in writing, or by appearing and pleading, waive the issuing of summons.

Waiver—compare sec. 406.

§ 842. Parties in justices' courts may appear and act in person or by attorney; and any person except the constable by whom the summons or jury process was served, may act as attorney.

Justices' court practitioners: Sec. 96.
Attorneys, generally: Sec. 275 et seq.

§ 843. When an infant, insane, or incompetent person is a party, he must appear, either by his general guardian if he have one, or by a guardian ad litem appointed by the justice. When a guardian ad litem is appointed by the justice, he must be appointed as follows:

1. If the infant, insane, or incompetent person be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years; if

under that age, or if insane or incompetent, upon the application of a relative or friend;

2. If the infant, insane, or incompetent person be defendant, the appointment must be made at the time the summons is returned, or before the answer, upon the application of the infant, if he be of the age of fourteen years, and apply at or before the summons is returned. If he be under the age of fourteen, or be insane or incompetent, or neglect so to apply, then upon the application of a relative or friend, or any other party to the action, or by the justice, on his own motion. [Amendment approved March 26, 1880; Amendments 1880, 18. In effect March 26, 1880.]

Guardians—compare secs. 372, 373.

§ 844. The summons must be directed to the defendant and signed by the justice, and must contain:

1. The title of the court, name of the county and city or township in which the action is commenced, and the names of the parties thereto;

2. A sufficient statement of the cause of action in general terms to apprise the defendant of the nature of the claim against him;

3. A direction that the defendant appear and answer before the justice, at his office, as specified in section 845 of this Code;

4. In an action arising on a contract for the recovery of money or damages only, a notice that unless the defendant so appear and answer, the plaintiff will take judgment for the sum claimed by him (stating it);

5. In other actions, a notice that unless defendant so appear and answer, the plaintiff will apply to the court for the relief demanded. If the plaintiff has appeared by attorney, the name of the attorney must be indorsed upon the summons.

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[Amendment approved March 26, 1880; Amendments, 1880, 19. In effect March 26, 1880.]

Contents of summons—compare sec. 407.

§ 845. The time specified in the summons for the appearance of the defendant must be as follows:

1. If an order of arrest be indorsed upon the summons, forthwith;

2. In all other cases, the summons must contain a direction that the defendant must appear and answer the complaint within five days, if the summons be served in the city and county, township, or city, in which the action is brought; within ten days, if served out of the township or city; but in the county in which the action is brought, and within twenty days, if served elsewhere. [Amendment approved March 26, 1880; Amendments 1880, 19. In effect March 26, 1880.]

§ 846. If the summons is returned without being served upon any or all of the defendants, the justice, upon the demand of the plaintiff, may issue an alias summons in the same form as the original, except that he may fix the time for the appearance of the defendant at a period not to exceed ninety days from its date.

Alias summons, generally: Compare sec. 408.

§ 847. The justice may, within a year from the date of the filing of the complaint, issue as many alias summons as may be demanded by the plaintiff.

Alias summons: See sec. 408.

§ 848. The summons cannot be served out of the county of the justice before whom the action is brought, except when the action is brought upon

a joint contract or obligation of two or more persons, who reside in different counties and the summons has been served upon the defendant, resident of the county, in which case the summons may be served upon the other defendant out of the county; and except, also, when an action is brought against a party who has contracted to perform an obligation at a particular place, and resides in a different county, in which case summons may be served in the county where he resides; and except, also, where an action is brought for injury to person or property, and the defendant resides in a different county, in which case summons may be served in the county where the defendant resides. [Amendment approved April 3, 1876; Amendments 1875-6, 98.]

Process of justices' courts—extent of: Secs. 94, 106.

§ 849. The summons may be served by a Sheriff or constable of any of the counties of this State; provided, that when a summons issued by a justice of the peace is to be served out of the county in which it was issued, the summons shall have attached to it a certificate, under seal, by the County Clerk of such county, to the effect that the person issuing the same was an acting justice of the peace at the date of the summons, or the summons may be served by any male resident, over the age of eighteen years, not a party to the suit, within the county where the action is brought and must be served and returned, as provided in title five, part two, of this Code, or it may be served by publication; and sections four hundred and thirteen and four hundred and twelve, so far as they relate to the publication of summons, are made applicable to justices' courts, the word "justice" being substituted for the word "judge" wherever the latter word occurs. [Amendment ap-

proved March 10, 1891; Stats. 1891, 51. In effect immediately.]

Manner of service and return of summons in justice court in San Francisco: See post, Appendix, p. 858.

Publication, service by: Secs. 412, 413.

§ 850. When all the parties served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix a day for the trial of said cause, and notify the plaintiff and the defendants who have appeared, thereof. The parties are entitled to one hour in which to appear after the time fixed in the said notice, but are not bound to remain longer than that time, unless both parties have appeared, and the justice, being present, is engaged in the trial of another cause. [Amendment approved April 3, 1876; Amendments 1875-6, 98. In effect sixty days after passage.]

Time of trial: Sec. 873 et seq.

CHAPTER III.

PLEADINGS IN JUSTICES' COURTS.

§ 851. Form of pleadings.
§ 852. Pleadings in Justices' Courts.
§ 853. Complaint defined.
§ 854. When demurrer to complaint may be put in.
§ 855. Answer.
§ 856. If the defendant omits to set up counterclaim.
§ 857. When plaintiff may demur to answer.
§ 858. Proceedings on demurrer.
§ 859. Amendment of pleadings.
§ 860. Answer or demurrer to amend pleadings.

§ 851. Pleadings in justices' courts:

1. Are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended;

2. May, except the complaint, be oral or in writing;

3. Must not be verified, unless otherwise provided in this title;

4. If in writing, must be filed with the justice;

5. If oral, an entry of their substance must be made in the docket.

Subdivision 3—verified answer: Sec. 112, subd. 2, sec. 838.

§ 852. The pleadings are:

1. The complaint by the plaintiff;

2. The demurrer to the complaint;

3. The answer by the defendant;

4. The demurrer to the answer.

Abbreviations and numerals: Sec. 186.

Trial: See secs. 873 et seq.

List of pleadings—generally: Sec. 422.

§ 853. The complaint in justices' courts is a concise statement, in writing, of the facts constituting the plaintiff's cause of action; or a copy of the account, note, bill, bond, or instrument upon which the action is based.

Complaint—generally: Sec. 426.

§ 854. The defendant may, at any time before answering, demur to the complaint.

Demurrer, generally: Sec. 430.

§ 855. The answer may contain a denial of any or all of the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defense or counterclaim, upon which an action might be brought by the defendant against the plaintiff in a justices' court.

Answer, generally: Sec. 437.

§ 856. If the defendant omit to set up a counter-claim in the cases mentioned in the last section, neither he nor his assignee can afterward maintain an action against the plaintiff therefor.

Counter-claim waived—generally: Sec. 439.

§ 857. When the answer contains new matter in avoidance, or constituting a defense or a counter-claim, the plaintiff may, at any time before the trial, demur to the same for insufficiency, stating therein the grounds of such demurrer.

Demurrer to answer—generally: Sec. 443.

§ 858. The proceedings on demurrer are as follows:

1. If the demurrer to the complaint is sustained, the plaintiff may, within such time, not exceeding two days, as the court allows, amend his complaint;

2. If the demurrer to a complaint is overruled, the defendant may answer forthwith;

3. If the demurrer to an answer is sustained, the defendant may amend his answer within such time, not exceeding two days, as the court may allow;

4. If the demurrer to an answer is overruled, the action must proceed as if no demurrer had been interposed.

Proceedings on demurrer—compare secs. 472, 636.

§ 859. Either party may, at any time before the conclusion of the trial, amend any pleading, but if the amendment is made after the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. The court may also, in its discretion, when an adjournment will by the

amendment be rendered necessary, require, as a condition to the allowance of such amendment, made after issue, joined, the payment of costs to the adverse party, to be fixed by the court, not exceeding twenty dollars. The court may also, on such terms as may be just, and on payment of costs, relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after the entry of the judgment and upon an affidavit showing good cause therefor.

Amendment, generally: Sec. 473; adjournment for: Sec. 874, subd. 2.

§ 860. When a pleading is amended, the adverse party may answer or demur to it within such time, not exceeding two days, as the court may allow.

Time to plead—compare sec. 432.

CHAPTER IV.

PROVISIONAL REMEDIES IN JUSTICES' COURTS.

Article I. Arrest and Bail.
II. Attachment.
III. Claim and Delivery of Personal Property.

ARTICLE I.

ARREST AND BAIL.

§ 861. Order of arrest and arrest of defendant.
§ 862. Affidavit and undertaking for order of arrest.
§ 863. A defendant arrested must be taken before the justice immediately.
§ 864. The officer must give notice to the plaintiff of arrest.
§ 865. The officer must detain the defendant.

§ 861. An order to arrest the defendant may be indorsed on a summons issued by the justice, and the defendant may be arrested thereon by the Sheriff or Constable, at the time of serving the summons and brought before the justice, and there detained until duly discharged, in the following cases:

1. In an action for the recovery of money or damages, on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the State, with intent to defraud his creditors;

2. In an action for a fine or penalty, or for money or property embezzled or fraudulently misapplied, or converted to his own use by one who received it in a fiduciary capacity;

3. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought;

4. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female can be arrested in any action.

Arrest and bail: Secs. 478 et seq.

Mesne and final process of justices' courts may be issued to any part of the county: Sec. 116.

§ 862. Before an order for an arrest can be made, the party applying must prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts upon which the application is founded. The plaintiff must also execute and deliver to the justice a written undertaking in the sum of three hundred dollars, with sufficient sureties, to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking. [Amendment approved March 24, 1874; Amendments 1873-4, p. 334. In effect July 1, 1874.]

Affidavit and undertaking for arrest: Compare secs. 481, 482.

Qualification of sureties: Sec. 1057.

§ 863. The defendant, immediately, upon being arrested, must be taken to the office of the justice who made the order, and if he is absent or unable to try the action, or if it appears to him by the affidavit of defendant, that he is a material witness in the action, the officer must immediately take the defendant before another justice of the township or city, if there is another, and if not, then before the justice of an adjoining township, who must take jurisdiction of the action, and proceed thereon, as if the summons had been issued and the order of arrest made by him.

§ 864. The officer making the arrest must immediately give notice thereof to the plaintiff, or his attorney or agent, and indorse on the summons, and subscribe a certificate, stating the time of serving the same, the time of the arrest, and of his giving notice to the plaintiff.

§ 865. The officer making the arrest must keep the defendant in custody until he is discharged by order of the justice.

ARTICLE II.

ATTACHMENT.

§ 866. Writ of attachment shall issue upon affidavit.
§ 867. Undertaking on attachment must be required.
§ 868. Writ of attachment, substance of. Officer may take an undertaking instead of levying.
§ 869. Certain provisions apply to all attachments in Justices' Courts.

§ 866. A writ to attach the property of the defendant must be issued by the justice at the time of, or after issuing summons and before answer, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in section five hundred and thirty-eight of this Code.

Attachment, generally: Sec. 537 et seq.

Mense and final process of justices' courts may be issued to any part of the county: Sec. 116.

§ 867. Before issuing the writ, the justice must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, in a sum not less than fifty, nor more than three hundred dollars, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all

damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Undertaking on attachment, generally: Sec. 539.

§ 868. The writ may be directed to the sheriff or any constable of the county, or the sheriff of any other county, and must require him to attach and safely keep all the property of the defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security, by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs; in which case, to take such undertaking.

Contents of writ: Compare sec. 540.

§ 869. The sections of this Code from section five hundred and forty-one to section five hundred and fifty-nine, both inclusive, are applicable to attachments issued in justices' courts, the word "constable" being substituted for the word "sheriff," whenever the writ is directed to a constable, and the word "justice" being substituted for the word "judge."

§§ 541-559. Sec. 541, property attachable. Secs. 542, 543, property, how sheriff attaches. Sec. 544, garnishee's liability. Sec. 545, examination of defendant and garnishee. Sec. 546, inventory, return, etc. Sec. 547, perishables. Sec. 548, other property, immediate sale of. Sec. 549, claim by third person. Sec. 550, realization of attached property after judgment for plaintiff. Sec. 551, collecting balance by sheriff. Sec. 552, proceedings if execution unsatisfied. Sec. 553, effect of judgment for defendant. Secs. 554-558, discharge of attachment. Sec. 559, sheriff's return. Releasing attachment.

ARTICLE III.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 70. How claim and delivery enforced.

§ 870. In an action to recover possession of personal property, the plaintiff may, at the time of issuing summons, or at any time thereafter before answer, claim the delivery of such property to him; and the sections of this Code, from section five hundred and ten to section five hundred and twenty-one, both inclusive, are applicable to such claim when made in justices' courts, the powers therein given and duties imposed on sheriffs being extended to constables, and the word "justice" substituted for "judge."

Claim and delivery: Secs. 509 et seq.

§§ 510-521. Sec. 510, affidavit for claim and delivery. Sec. 511, requisition for sheriff to take property claimed. Sec. 512, undertaking by plaintiff. Sec. 513, exception to sureties by defendant. Sec. 514, defendant claiming redelivery. Sec. 515, justification of defendant's sureties. Sec. 516, qualifications of sureties. Sec. 517, breaking open building, etc. Sec. 518, property, how kept. Sec. 519, claim by third person. Sec. 520, sheriff to file notice, affidavit, etc. Sec. 521 (repealed March 24; took effect July 1, 1874).

CHAPTER V.

JUDGMENT BY DEFAULT IN JUSTICES' COURTS.

§ 871. Judgment when defendant fails to appear.
§ 872. Judgment against defendant on demurrer.

§ 871. If the defendant fail to appear, and to answer or demur within the time specified in the summons, then, upon proof of service of summons, the following proceedings must be had:

1. If the action is based upon a contract, and is for the recovery of money, or damages only, the court must render judgment in favor of plaintiff for the sum specified in the summons:

2. In all other actions the court must hear the evidence offered by the plaintiff, and must render judgment in his favor for such sum (not exceeding the amount stated in the summons) as appears by such evidence to be just. [Amendment approved April 17, 1880; Amendments 1880, p. 113. In effect April 16, 1880.]

Default judgment, generally: Sec. 585.

§ 872. In the following cases the same proceedings must be had, and judgment must be rendered in like manner, as if the defendant had failed to appear and answer or demur:

1. If the complaint has been amended, and the defendant fails to answer it as amended, within the time allowed by the court:

2. If the demurrer to the complaint is overruled, and the defendant fails to answer at once;

3. If the demurrer to the answer is sustained, and the defendant fails to amend the answer within the time allowed by the court.

Compare sec. 858.

CHAPTER VI.

TIME OF TRIAL AND POSTPONEMENTS IN JUSTICES' COURTS.

§ 873. Time when trial must be commenced.
§ 874. When court may, of its own motion, postpone trial.
§ 875. Postponement by consent.
§ 876. Postponement upon application of a party.
§ 877. No continuance for more than ten days to be granted, unless upon filing of undertaking.

§ 873. Unless postponed as provided in this chapter, or unless transferred to another court, the trial of the action must commence at the expiration of one hour from the time specified in the notice mentioned in section 850, and the trial must be continued without adjournment for more than twenty-four hours at any one time, until all the issues therein are disposed of. [Amendment approved April 3, 1876; Amendments 1875-6, p. 98. In effect sixty days after passage.]

§ 874. The court may, of its own motion, postpone the trial:

1. For not exceeding one day, if, at the time fixed by law or by an order of the court for the trial, the court is engaged in the trial of another action;

2. For not exceeding two days, if, by an amendment of the pleadings, or the allowance of time to make such amendment or to plead, a postponement is rendered necessary;

3. For not exceeding three days, if the trial is upon issues of fact, and a jury has been demanded.

Amendment of pleadings, etc.: See secs. 858, 859.

§ 875. The court may, by consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties.

§ 876. The trial may be postponed upon the application of either party, for a period not exceeding four months:

1. The party making the application must prove, by his own oath or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and must show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so;

2. If the application is on the part of the plaintiff, and the defendant is under arrest, a postponement for more than three hours discharges the defendant from custody; but the action may proceed, notwithstanding, and the defendant is subject to arrest on execution, in the same manner as if he had not been discharged;

3. If the application is on the part of a defendant under arrest, before it can be granted he must execute an undertaking, with two or more sufficient sureties, to be approved by, and in a sum to be fixed by, the justice, to the effect that he will render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action, not exceeding the amount specified in the undertaking. On filing the undertaking specified in this subdivision, the justice must order the defendant to be discharged from custody;

4. The party making the application must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, may be then taken by deposition before the justice, and that the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witness was produced.

But the court may require the party making the application to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.

Postponement, generally: Sec. 595; costs of, sec. 1029.

Arrest and bail: Sec. 478 et seq.

§ 877. No adjournment must, unless by consent, be granted for a period longer than ten days, upon the application of either party, except upon condition that such party file an undertaking, in an amount fixed by the justice, with two sureties, to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying, not exceeding the sum specified in the undertaking.

CHAPTER VII.

TRIALS IN JUSTICES' COURTS.

§ 878. Issue defined, and the different kinds.
§ 879. Issue of law, how raised.
§ 880. Issue of fact, how raised.
§ 881. Issue of law, how tried.
§ 882. Issue of fact, how tried.
§ 883. Jury, how waived.
§ 884. Either party failing to appear, trial may proceed at request of other party.
§ 885. Challenges to jurors.
§ 886. Manner of pleading a written instrument.
§ 887. If a copy of an instrument be filed, signatures will be deemed admitted, unless denied under oath.

§ 878. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the

one party, and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

Compare this and the next two sections with sections 588-590.

§ 879. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

Same as sec. 589.

§ 880. An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; and,
2. Upon new matter in the answer, except an issue of law is joined thereon.

Same as sec. 590.

§ 881. An issue of law must be tried by the court.

Compare sec. 591.

§ 882. An issue of fact must be tried by a jury, unless a jury is waived, in which case it must be tried by the court.

Compare sec. 592.

§ 883. A jury may be waived:

1. By consent of parties, entered in the docket;
2. By a failure of either party to demand a jury before the commencement of the trial of an issue of fact;
3. By the failure of either party to appear at the time fixed for the trial of an issue of fact.

Waiver of jury: Compare sec. 631.

§ 884. If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party.

Compare sec. 594.

§ 885. The challenges are either peremptory or for cause. Each party is entitled to three peremptory challenges. Either party may challenge for cause on any grounds set forth in section six hundred and two. Challenges for cause must be tried by the justice.

Challenges: Compare secs. 601, 602.

§ 886. When the cause of action or counterclaim arises upon an account or instrument for the payment of money only, the court, at any time before the trial, may, by an order under his hand, require the original to be exhibited to the inspection of, and a copy to be furnished to, the adverse party, at such time as may be fixed in the order; or, if such order is not obeyed, the account or instrument cannot be given in evidence.

Order for inspection: Sec. 1000.

§ 887. If the plaintiff annex to his complaint, or file with the justice at the time of issuing the summons, the original or a copy of the promissory note, bill of exchange, or other written obligation for the payment of money, upon which the action is brought, the defendant is deemed to admit the genuineness of the signatures of the makers, indorsers, or assignors thereof, unless he specifically denies the same in his answer, and verify the answer by his oath.

Compare secs. 447, 853.

CHAPTER VIII.

JUDGMENTS (OTHER THAN BY DEFAULT) IN JUSTICES' COURTS.

§ 889. Judgment by confession.
§ 890. Judgment of dismissal entered in certain cases without prejudice.
§ 891. Judgment upon verdict.
§ 892. Judgment after trial by the court.
§ 893. Judgment when the defendant is subject to arrest.
§ 894. If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted.
§ 895. Offer to compromise before trial.
§ 896. Costs may be included in the judgment.
§ 897. Abstract of judgment.
§ 898. Abstract may be filed and docketed in county clerk's office.
§ 899. Effect of docketing.
§ 900. Judgment not a lien unless abstract is recorded in the recorder's office.

§ 889. Judgments upon confession may be entered up in any justices' court specified in the confession.

Confession of judgment, generally: Secs. 1132-1135; jurisdiction, sec. 112, subd. 6.

§ 890. Judgment that the action be dismissed, without prejudice to a new action, may be entered with costs, in the following cases:

1. When the plaintiff voluntarily dismisses the action before it is finally submitted;

2. When he fails to appear at the time specified in the summons, or at the time to which the action has been postponed, or within one hour thereafter;

3. When, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court;

4. When it is objected at the trial, and appears by the evidence, that the action is brought in the

wrong county, or township, or city; but if the objection is taken and overruled, it is cause only of reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial, it is waived.

Dismissal: Compare sec. 581.

§ 891. When a trial by jury has been had, judgment must be entered by the justice, at once, in conformity with the verdict.

Entry of judgment, generally: Sec. 664; as affecting appeal, see sec. 939.

§ 892. When the trial is by the court, judgment must be entered at the close of the trial.

§ 893. The judgment in justices' courts must be entered substantially in the form required by section six hundred and sixty-seven of this Code. When the judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, the fact that the defendant is so subject, must be stated in the judgment. [Amendment approved March 24, 1874; Amendments 1873-4, p. 334. In effect July 1, 1874.]

Final process may be issued to any part of the county: Sec. 106.

§ 894. When the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

Limit, three hundred dollars: Sec. 112.

§ 895. If the defendant, at any time before the trial, offer, in writing, to allow judgment to be taken against him for a specified sum, the plain-

tiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum in excess of the offer, he cannot recover costs, but costs must be adjudged against him, and, if he recover, be deducted from his recovery. The offer and failure to accept it cannot be given in evidence nor affect the recovery, otherwise than as to costs. [Amendment approved March 2, 1878; Amendments 1877-8, p. 103.]

Offer to compromise, compare sec. 997.

§ 896. The justice must tax and include in the judgment the costs allowed by law to the prevailing party.

Percentage in San Francisco: See post, Appendix.

§ 897. The justice, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in substantially the following form (filling blanks according to the facts):

State of California, ——— county, (or city and county). ———, plaintiff, v. ———, defendant. In justices' court, before ———, justice of the peace, ——— township (or city, or city and county), ———, 18— [inserting date of abstract]. Judgment entered for plaintiff (or defendant), for $——, on the —— day of ———. I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court—or (as the case may be) in the court of ———, justice of the peace, as appears by his docket, now in my possession, as his successor in office. —— ———, Justice of the Peace. [Amendment approved March 10, 1880; Amendments 1880, p. 19. In effect March 26, 1880.]

§ 898. The abstract may be filed in the office of the county clerk of the county in which the judgment was rendered, and the judgment docketed in the judgment docket of the Superior Court thereof. The time of the receipt of the abstract by the clerk must be noted by him thereon, and entered in the docket. [Amendment approved March 10, 1880; Amendments 1880, p. 20. In effect March 26, 1880.]

Docketing, generally: Sec. 671.
Recording transcript: Sec. 674.

§ 899. From the time of docketing in the county clerk's office, execution may be issued thereon by the county clerk to the sheriff of any county in the State, other than the county in which the judgment was rendered, in the same manner and with like effect as if issued on a judgment of the Superior Court. [Amendment approved March 10, 1880; Amendments 1880, p. 20. In effect March 26, 1880.]

Execution, generally: Sec. 681 et seq.
Docketing: Sec. 671.
Recording: Sec. 674.

§ 900. A judgment rendered in a justice's court creates no lien upon any lands of the defendant, unless such an abstract is filed in the office of the recorder of the county in which the lands are situated. When so filed, and from the time of filing, the judgment becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien continues for two years, unless the judgment be previously satisfied. [Amendment approved April 16, 1880; Amendments 1880, p. 113. In effect April 16, 1880.]

Lien, extent and duration of, compare sec. 674.

CHAPTER IX.

EXECUTIONS FROM JUSTICES' COURTS.

§ 901. Execution may issue at any time within five years.
§ 902. Execution, contents of.
§ 903. Renewal of execution.
§ 904. Duty of officer receiving execution.
§ 905. Proceedings supplementary to execution.

§ 901. Execution for the enforcement of a judgment of a justice's court may be issued by the justice who entered the judgment, or his successor in office, on the application of the party entitled thereto, at any time within five years from the entry of judgment.

Within five years, generally: Sec. 685.

Execution, generally, Sec. 681 et seq.

Final process may be issued to any part of the country: Sec. 116.

§ 902. The execution must be directed to the sheriff or to a constable of the county, and must be subscribed by the justice and bear date the day of its delivery to the officer. It must intelligibly refer to the judgment, by stating the names of the parties, and the name of the justice before whom, and of the county and the township or city where, and the time when, it was rendered; the amount of judgment, if it be for money; and, if less than the whole is due, the true amount due thereon. It must contain, in like cases, similar directions to the sheriff or constable, as are required by the provisions of title nine, part two, of this Code, in an execution to the sheriff.

Compare sec. 681 et seq.

§ 903. An execution may, at the request of the judgment creditor, be renewed before the expira-

tion of the time fixed for its return, by the word "renewed," written thereon, with the date thereof, and subscribed by the justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. If an execution is returned unsatisfied, another may be afterward issued.

§ 904. The sheriff or constable to whom the execution is directed must execute the same in the same manner as the sheriff is required by the provisions of title nine, part two, of this Code, to proceed upon executions directed to him; and the constable, when the execution is directed to him, is vested for that purpose with all the powers of the sheriff.

Execution of writ, compare sec. 691 et seq.; and generally, see sec. 688 et seq.

See ante, secs, 681 et seq.

§ 905. The sections of this Code, from seven hundred and fourteen to seven hundred and twenty-one, both inclusive, are applicable to justices' courts, the word "constable" being substituted, to that end, for the word "sheriff," and the word "justice" for the word " judge."

Proceedings supplementary to execution: Secs. 714-721.

CHAPTER X.

CONTEMPTS IN JUSTICES' COURTS.

§ 906. Contempts a justice may punish for.
§ 907. Proceedings for contempt.
§ 908. Same.
§ 909. Punishments for contempts.
§ 910. The conviction must be entered in the docket.

§ 906. A justice may punish as for contempt, persons guilty of the following acts, and no other:

1. Disorderly, contemptuous, or insolent behavior toward the justice while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

2. A breach of the peace, boisterous conduct, or violent disturbance in the presence of the justice, or in the immediate vicinity of the court held by him, tending to interrupt the due course of a trial or other judicial proceeding;

3. Disobedience or resistance to the execution of a lawful order or process, made or issued by him;

4. Disobedience to a subpoena duly served, or refusing to be sworn or to answer as a witness;

5. Rescuing any person or property in the custody of an officer by virtue of an order or process of the court held by him.

Contempts, generally: Sec. 1209 et seq.

Courts and judicial officers, powers of: Sec. 128; secs. 177-179.

§ 907. When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily; to that end an order must be made reciting the facts, as they occurred, and adjudging that the person proceeded against

is thereby guilty of contempt, and that he be punished as therein prescribed.

Compare sec. 1211.

§ 908. When the contempt is not committed in the immediate view and presence of the justice, a warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice immediately, when an opportunity to be heard in his defense, or excuse, must be given. The justice may, thereupon, discharge him, or may convict him of the offense.

Compare sec. 1211; sec. 1212 et seq.

§ 909. A justice may punish for contempts by fine or imprisonment, or both; such fine not to exceed in any case one hundred dollars, and such imprisonment one day.

§ 910. The conviction, specifying particularly the offense and the judgment thereon, must be entered by the justice in his docket.

CHAPTER XI.

DOCKETS OF JUSTICES.

§ 911. Docket, what to contain.
§ 912. Entries therein primary evidence of the facts.
§ 913. An index to the docket must be kept.
§ 914. Dockets must be delivered by justice to his successor, or to county clerk.
§ 915. Proceedings when office becomes vacant, and before a successor is appointed.
§ 916. Docket of another justice—Creation of a new county.
§ 917. Justice is successor of prior holder.
§ 918. Designation of succeeding justice.

§ 911. Every justice must keep a book, denominated a "docket," in which he must enter:

1. The title of every action or proceeding;

2. The object of the action or proceeding; and if a sum of money be claimed, the amount thereof;

3. The date of the summons, and the time of its return; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of the fact;

4. The time when the parties, or either of them, appear, or their nonappearance, if default be made; a minute of the pleadings and motions; if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleadings;

5. Every adjournment, stating on whose application and to what time;

6. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the return of the jury and for the trial;

7. The names of the jurors who appear and are sworn, and the names of all witnesses sworn, and at whose request;

8. The verdict of the jury, and when received; if the jury disagree and are discharged, the fact of such disagreement and discharge;

9. The judgment of the court, specifying the costs included, and the time when rendered;

10. The issuing of the execution, when issued and to whom; the renewals thereof, if any, and when made, and a statement of any money paid to the justice, when and by whom;

11. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed. [Amendment approved March 24, 1874; Amendments 1873-4, p. 334. In effect July 1, 1874.]

Docket in cities and counties: Sec. 93.

§ 912. The several particulars of the last section specified must be entered under the title of the action to which they relate, and (unless otherwise in this title provided) at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice, or his successor in office, are prima facie evidence of the facts so stated. [Amendment approved March 10, 1880; Amendments 1880, p. 20. In effect March 26, 1880.]

Prima facie evidence: Sec. 1833.

§ 913. A justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs must be entered in the index, in the alphabetical order of the first letter of the family name.

§ 914. Every justice of the peace, upon the expiration of his term of office, must deposit with his successor his official dockets and all papers filed in his office, as well his own as those of his predecessors, or any other which may be in his custody to be kept as public records.

§ 915. If the office of a justice become vacant by his death or removal from the township or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited in the office of some other justice in the township, to be by him delivered to the successor of such justice. If there is no other justice in the township, then the docket and papers of such justice must be deposited in the office of the county clerk of the county, to be by him delivered to the successor in office of the justice.

§ 916. Any justice with whom the docket of his predecessor or of another justice is deposited, has and may exercise over all actions and proceedings entered in such docket, the same jurisdiction as if originally commenced before him. In case of the creation of a new county, or the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory, may come, is, for the purposes of this section, considered the successor of such former justice.

§ 917. The justice elected to fill a vacancy is the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township or city, from that time is the successor.

§ 918. When two or more justices are equally entitled, under the last section, to be deemed the successors in office of the justice, a judge of the Superior Court must, by a certificate subscribed by him and filed in the office of the county clerk, designate which justice is the successor of a justice going out of office, or whose office has become vacant. [Amendment approved March 10, 1880; Amendments 1880, p. 20. In effect March 26, 1880.]

CHAPTER XII.

GENERAL PROVISIONS RELATING TO JUSTICES' COURTS.

§ 919. Justices may issue subpoenas and final process to any part of the county.
§ 920. Blanks must be filled in all papers issued by a justice, except subpoenas.
§ 921. Justices to receive all moneys collected and pay same to parties.
§ 922. In case of disability of justice another justice may attend on his behalf.
§ 923. Justices may require security for costs.
§ 924. Who entitled to costs.
§ 925. What provisions of Code applicable to Justices' Courts.
§ 926. Deposit in lieu of undertaking.

§ 919. Justices of the peace may issue subpoenas in any action or proceeding in the courts held by them, and final process on any judgment recovered therein, to any part of the county.

Final process, to any part of the county: Secs. 94, 106.

§ 920. The summons, execution, and every other paper made or issued by a justice, except a subpoena, must be issued without a blank left to be filled by another, otherwise it is void.

§ 921. Justices of the peace must receive from the sheriff or constables of their county, all moneys collected on any process or order issued from their courts respectively, and must pay the same, and all moneys paid to them in their official capacity, over to the parties entitled or authorized to receive them, without delay. [Amendment approved March 10, 1880; Amendments 1880, p. 20. In effect March 26, 1880.]

§ 922. In case of the sickness or other disability, or necessary absence of a justice, on a return of a summons, or at the time appointed for a trial, another justice of the same township or city may, at his request, attend in his behalf, and thereupon is vested with the power, for the time being, of the justice before whom the summons was returnable. In that case, the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction.

§ 923. Justices may, in all cases, require a deposit of money or an undertaking, as security for costs of court, before issuing a summons.

Prepayment of fees: Sec. 91.

§ 924. The prevailing party in justices' courts is entitled to costs of the action, and also of any proceedings taken by him in aid of an execution, issued upon any judgment recovered therein. [Amendment approved March 24, 1874; Amendments 1873-4, p. 335. In effect July 1, 1874.]

Costs: See sec. 896.

§ 925. Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this Code which are, in their nature, applicable to the organization, powers, and course of proceedings in justices' courts, or which have been made applicable by special provisions in this title, are applicable to justices' courts and the proceedings therein.

Peculiar and limited jurisdiction: Secs. 112-114.

§ 926. In all civil cases arising in justices' courts, wherein an undertaking is required as pre-

scribed in this Code, the plaintiff or defendant may deposit with said justice a sum of money in United States gold coin equal to the amount required by the said undertaking, which said sum of money shall be taken as security in place of said undertaking. [New section approved February 25, 1878; Amendments 1877-8, p. 103. In effect sixty days after passage.]

TITLE XII.

PROCEEDINGS IN CIVIL ACTIONS IN POLICE COURTS.

§ 929. How commenced.
§ 930. Summons must issue on filing complaint.
§ 931. Defendant may plead orally or in writing.
§ 932. Trial by jury, when defendant is entitled to.
§ 933. Proceedings to be conducted as in Justices' Courts.

§ 929. Civil actions in police courts are commenced by filing a complaint, setting forth the violation of the ordinance complained of, with such particulars of time, place, and manner of violation as to enable the defendant to understand distinctly the character of the violation complained of, and to answer the complaint. The ordinance may be referred to by its title. The complaint must be verified by the oath of the party complaining, or of his attorney or agent.

§ 930. Immediately after filing the complaint, a summons must be issued, directed to the defendant, and returnable either immediately or at any time designated therein, not exceeding four days from the date of its issuing.

§ 931. On the return of the summons the defendant may answer the complaint. The answer may be oral or in writing, and immediately thereafter the case must be tried, unless, for good cause shown, an adjournment is granted.

§ 932. In all actions for violation of an ordinance, where the fine, forfeiture, or penalty imposed by the ordinance is less than fifty dollars, the trial must be by the court. In actions where the fine, forfeiture, or penalty imposed by the ordinance is over fifty dollars, the defendant is entitled to a trial by jury.

§ 933. All proceedings in civil actions in police courts must, except as in this title otherwise provided, be conducted in the same manner as civil actions in justices' courts.

Civil proceedings in justices' courts: Secs. 832-925.

TITLE XIII.

OF APPEALS IN CIVIL ACTIONS.

Chapter I. Appeals in general.
II. Appeals from District Courts.
III. Appeals from County Courts.
IV. Appeals from Probate Courts.
V. Appeals to County Courts.

CHAPTER I.

APPEALS IN GENERAL.

§ 936. Judgment and orders may be reviewed.
§ 937. Orders made out of court, without notice, may be reviewed by the judge.
§ 938. Party aggrieved may appeal. Names of parties.
§ 939. Within what time appeal may be taken.
§ 940. Appeal, how taken.
§ 941. Appellant must file undertaking within five days.
§ 942. Undertaking on appeal from a money judgment.
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§ 946. Stay of proceedings. The security on appeal may be limited in the case of an execution, etc.
§ 947. Undertaking may be in one instrument or several.
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§ 949. Undertakings in cases not specified.
§ 950. What papers to be used on an appeal from the judgment.
§ 951. What papers used on appeals from orders, except orders granting or refusing new trials.
§ 952. What papers to be used on an appeal from an order granting or refusing a new trial.
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§ 954. When appeal may be dismissed. When not.
§ 955. Effect of dismissal.
§ 956. What may be reviewed on appeal from judgment.
§ 957. Remedial powers of an appellate court.
§ 958. On judgment on appeal, remittitur must be certified to the clerk of the court below.
§ 959. Provisions of this chapter not applicable to appeals to County Courts.

§ 936. A judgment or order in a civil action, except when expressly made final by this Code, may be reviewed as prescribed in this title, and not otherwise.

Judgments and orders, appeal from: Sec. 939.

§ 937. An order made out of court, without notice to the adverse party, may be vacated or modified without notice, by the judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made.

Orders, generally: Sec. 1003 et seq.

§ 938. Any party aggrieved may appeal in the cases prescribed in this title. The party appealing is known as the appellant, and the adverse party as the respondent.

Death of party: Sec. 385.

Appeals from judgments or orders in courts existing before January 1, 1880. See post, Appendix, p. 865.

§ 939. An appeal may be taken:

1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within six months after the entry of judgment. But an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment;

2. From a judgment rendered on an appeal from an inferior court, within ninety days after the entry of such judgment;

3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dis-

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solve an injunction; from an order appointing a receiver; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment; from an interlocutory judgment in actions for partition of real property; and from an order confirming, changing, modifying, or setting aside the report, in whole or in part, of the referees in actions for partition of real property in the cases mentioned in section seven hundred and sixty-three of this Code, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk. [Approved March 3, 1897; Stats. 1897, c. 62.]

Effect of appeal: See. sec. 946, infra. As to the record on appeals, see sec. 951, post.

Appeals, to Supreme Court: Secs. 963-966; to Superior Court, secs. 974-980.

Definition of judgment, sec. 577; exceptions, need of, secs. 646, 956.

As to appeal from judgment on controversy submitted without action, see sec. 1140.

Orders reviewable on appeal from judgment: Sec. 956.

§ 940. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the ad-

verse party in writing. [Amendment approved March 24, 1874; Amendments 1873-4, p. 336. In effect July 1, 1874.]

Filing and serving: Sec. 1015.

Notice of appeal, generally: See sec. 1010 et seq.; see sec. 1714.

Undertaking on appeal, requirements of: Sec. 941; unnecessary, when, secs. 965, 1058; exception to sureties, time for, sec. 648.

Exceptions, necessity for: Secs. 646, 956.

Service of papers: Secs. 1010-1017.

As to the practice on appeals in criminal causes in such cases, see Pen. Code, sec. 1237.

§ 941. The undertaking on appeal must be in writing, and must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal.

Undertaking on appeal, filing, time for: Sec. 940; and see sec. 1054; sufficiency of, sec. 954; sureties, paying judgment, sec. 1059.

Deposit with clerk: Sec. 948; also secs. 573, 2104.

Liability of, Civ. Code: Sec. 2836; qualification, sec. 1058; subrogation, sec. 709.

Filing new undertaking in appellate court: See post, sec. 954.

Qualification of sureties: Sec. 1057.

Liability on undertakings, generally. As to sureties' rights, see secs. 709, 1059.

§ 942. If the appeal be from a judgment or order directing the payment of money, it does not

stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than two thousand dollars, and the sureties do not state in their affidavits of justification accompanying the undertaking, that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as in their affidavits they may state that they are severally worth, and judgment may be entered against the sureties by the court from which the appeal is taken, pursuant to the stipulations herein designated. When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency. [Amend-

ment approved March 24, 1874; Amendments 1873-4, p. 336. In effect July 1, 1880.]

Deposit in lieu of undertaking: Secs. 941, 948.
Qualification of sureties: Sec. 1057.
Specified kind of money: Sec. 667.
Stay where no provision made: See sec. 949.

§ 943. If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal. If the judgment or order appealed from appoint a receiver, the execution of the judgment or order cannot be stayed by appeal, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that if such judgment or order be affirmed or the appeal dismissed, the appellant will pay all damages which the respondent may sustain by reason of such stay, not exceeding an amount to be fixed by the judge of the court by which the judgment was rendered or order made, which amount must be specified in the undertaking. If the judgment or order appealed from direct the sale of personal property upon the foreclosure of a mortgage thereon, the execution of the judgment or order cannot be stayed on appeal, unless an undertaking be entered into on the part of the appellant, with at least two sureties, in such amount as the court, or the judge thereof, may direct, to the effect that the appellant will, on

demand, deliver the mortgaged property to the proper officer if the judgment be affirmed, or in default of such delivery that the appellant and sureties will, on demand, pay to the proper officer the full value of such property at the date of the appeal. [Approved March 3, 1897; Stats. 1897, c. 64.]

Receiver: Sec. 564.
Undertaking: Sec. 941.

§ 944. If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court.

§ 945. If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding the sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency.

Realty, sale or delivery of possession of: Secs. 726, 744.
Deposit with clerk: Secs. 941, 948.
Undertaking: Sec. 941.
Qualifications of sureties: Sec. 1057.
Waste: Secs. 745, 746.

§ 946. Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from. And the court below may, in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right. An appeal does not continue in force an attachment unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and, unless, within five days after the entry of the order appealed from, such appeal be perfected. [Amendment approved March 24, 1874; Amendments 1873-4, p. 337. In effect July 1, 1874.]

Security of executor: See sec. 966.

§ 947. The undertakings prescribed by sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, and nine hundred and forty-five, may be in one instrument or several, at the option of the appellant.

§ 948. The adverse party may except to the sufficiency of the sureties to any of the undertakings mentioned in sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, and nine hundred and forty-five, at any time within thirty days after the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, or county clerk, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this title, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking, and in all cases the undertaking or deposit may be waived by the written consent of the respondent. [Amendment approved March 9, 1880; Amendments 1880, p. 6. In effect March 9, 1880.]

Justification of sureties: See sec. 495.

§ 949. In cases not provided for in sections nine hundred and forty two, nine hundred and forty-three, nine hundred and forty-four, and nine hundred and forty-five, the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section nine hundred and forty-one, stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property; in which case the court below may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court. And except also, where it adjudges the defendant guilty of usurping, or intruding into, or unlawfully

holding public office, civil or military, within this State. And except also, where the order grants, or refuses to grant, a change of the place of trial of an action. [Amendment approved February 16, 1874; Amendments 1873-4, p. 408. In effect February 16, 1874.]

§ 950. On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case, upon which the appellant relies. Any statement used on motion for a new trial, or settled after decision of such motion, when the motion is made upon the minutes of the court, as provided in section six hundred and sixty-one, or any bill of exceptions settled, as provided in sections six hundred and forty-nine or six hundred and fifty, or used on motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial. [Amendment approved March 24, 1874; Amendments 1873-4, p. 338. In effect July 1, 1874.]

Judgment roll: Sec. 670.

Exceptions: Sec. 956.

Transcript, authentication of: Sec. 953; contents, secs. 950-952.

§ 951. On appeal from a judgment rendered on an appeal, or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below. [Amendment approved March 24, 1874; Amendments, 1873-4, p. 339. In effect July 1, 1874.]

Lost papers: Sec. 1045.

§ 952. On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in section six hundred and sixty-one of this Code. [Amendment approved March 24, 1874; Amendments 1873-4, p. 339. In effect July 1, 1874.]

Papers on appeal, generally: See secs. 950, 951.
Lost papers: Sec. 1045.

§ 953. The copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys, and must be accompanied with a certificate of the clerk or attorneys that an undertaking on appeal, in due form, has been properly filed, or a stipulation of the parties waiving an undertaking. [Amendment approved March 24, 1874; Amendments 1873-4, p. 339. In effect July 1, 1874.]

Review on appeal: Sec. 53.

§ 954. If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of the Supreme Court, be filed in the Supreme Court before the hearing upon motion to dismiss the appeal. When it is made to appear to the satisfaction of the court, or a judge thereof, from which the appeal was taken, that a surety or sureties upon an appeal bond from any cause has or have become insufficient, and the bond or undertaking inadequate as security for the payment of the judgment appealed from, the last-named court, or a judge thereof, may order the giving of a new bond with sufficient sureties, as a condition to the main-

tenance of the appeal. The said bond or undertaking shall be approved by the last-named court, or a judge thereof; and in case said sureties fail to justify before said last-named court, or a judge thereof, or fail to comply with the order to appear and justify, execution may issue upon the judgment as if no undertaking to stay execution had been given. [Amendment approved March 16, 1895; Stats. 1895, p. 59. In effect in sixty days.]

See sec. 951.

§ 955. The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

§ 956. Upon an appeal from a judgment, the court may review the verdict or decision, and any intermediate order or decision excepted to, which involves the merits, or necessarily affects the judgment, except a decision or order from which an appeal might have been taken. [Amendment approved April 3, 1876; Amendments 1875-6, p. 91. In effect June 1, 1876.]

§ 957. When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent, enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale. When it appears to the ap-

pellate court that the appeal was made for delay, it may add to the costs such damages as may be just. [Amendment approved March 24, 1874; Amendments 1873-4, p. 340. In effect July 1, 1874.]

Judgment reversed: Sec. 966.

Costs on appeal, generally: Sec. 1034; costs below, etc., see secs. 1022, 1039; where modification of judgment, sec. 1027, subd. 2.

§ 958. When judgment is rendered upon the appeal, it must be certified by the clerk of the Supreme Court to the clerk with whom the judgment roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment roll, and enter a minute of the judgment of the Supreme Court on the docket; against the original entry. In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified by the Supreme Court on appeal.

Judgment rendered on appeal: Sec. 45.

Remittitur.—Judgment becomes final thirty days after it is filed: See Const., art. 6, sec. 2.

§ 959. The provisions of this chapter do not apply to appeals to Superior Courts. [Amendment approved March 9, 1880; Amendments 1880, p. 6. In effect March 9, 1880.]

Appeals to Superior Courts: Secs. 974-980.

CHAPTER II.

APPEALS TO SUPREME COURT.

§ 963. When an appeal may be taken.
§ 934. Appeals; in what cases appealed from Justices' Courts.
§ 965. Appeals by executors and administrators.
§ 966. Acts of executors and administrators, where appointment vacated.

§ 963. An appeal may be taken to the Supreme Court, from a Superior Court, in the following cases:

1. From a final judgment entered in an action, or special proceeding, commenced in a Superior Court, or brought into a Superior Court from another court.

2. From an order granting or refusing a new trial, or granting or dissolving an injunction, or refusing to grant or dissolve an injunction, or appointing a receiver, or dissolving or refusing to dissolve an attachment, or changing or refusing to change the place of trial, from any special order made after final judgment, and from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties, and directs partition to be made;

3. From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor, administrator, or guardian; or refusing,

allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, or legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser or appraisers setting apart a homestead. [Approved March 27, 1897; Stats. 1897, c. 151.]

Appeal from final judgment, compare sec. 939, subd. 1.

Appeals from orders, compare sec. 939, subd. 3.

Appeals from probate decisions, generally: See secs. 1714, 1715; special administration, granting no appeal, sec. 1413.

Appeals in criminal cases: See sec. 52, ante, and secs. 1237, 1238, of the Penal Code.

§ 964. The foregoing section does not apply in cases appealed from justices', police, or other inferior courts, except cases of forcible entry and detainer, and cases involving the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars.

Appeals to Superior Court: Sec. 974 et seq.

Forcible entry and detainer, concurrent jurisdiction of justices' courts, sec. 113, subd. 1.

§ 965. When an executor, administrator, or guardian, who has given an official bond, appeals from a judgment or order of the Superior Court made in the proceedings had upon the estate of which he is executor, administrator, or guardian, his official bond shall stand in the place of an undertaking on appeal; and the sureties thereon shall be liable as on such undertaking.

Undertaking on appeal, and generally: Sec. 941.

Probate appeals: Sec. 963, subd. 3.

§ 966. When the judgment or order appointing an executor, or administrator, or guardian, is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed.

Appointment of executor, etc., appeal from: Sec. 963, subd. 3.

Restitution on reversal, etc: Sec. 957.

CHAPTER III.

APPEALS TO SUPERIOR COURTS.

§ 974. Appeal from judgment of Justice's or Police Court.
§ 975. Appeal on questions of law; statement.
§ 976. Appeal on questions of fact, or law and fact.
§ 977. Transmission of papers to appellate court.
§ 978. Undertaking on appeal.
§ 979. Stay of proceedings on filing undertaking.
§ 980. Powers of Superior Court on appeal.

§ 974. Any party dissatisfied with a judgment rendered in a civil action in a Police or Justice's Court, may appeal therefrom to the Superior Court of the county, at any time within thirty days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party. The notice must state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact, or both.

Notice of appeal, service on adverse party: See sec. 1015, and compare sec. 940.

Appeals from decrees or orders of courts in existence before January 1, 1880: See post, Appendix, p. 865.

§ 975. When a party appeals to the Superior Court on questions of law alone, he must, within ten days from the rendition of judgment, prepare a statement of the case and file the same with the justice or judge. The statement must contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more. Within ten days after he receives notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments. The proposed statement and amendments must be settled by the justice or judge; and if no amendment be filed, the original statement stands as adopted. The statement thus adopted, or as settled by the justice or judge, with a copy of the docket of the justice or judge, and all motions filed with him by the parties during the trial, and the notice of appeal, may be used on the hearing of the appeal before the Superior Court.

Settlement of statement on appeal: Compare sec. 650.

§ 976. When a party appeals to the Superior Court on questions of fact, or on questions of both law and fact, no statement need be made, but the action must be tried anew in the Superior Court. [Amendment approved March 26, 1880; Amendments 1880, p. 16. In effect March 26, 1880.]

Conduct of trial: Sec. 980.

§ 977. Upon receiving the notice of appeal, and on payment of the fees of the justice or judge, payable on appeal and not included in the judgment, and filing an undertaking as required in the next section, and after settlement or adoption of statement, if any, the justice or judge must, within five days, transmit to the clerk of the Superior

Court, if the appeal be on questions of law alone, a certified copy of his docket, the statement as admitted or as settled, the notice of appeal, and the undertaking filed; or, if the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions, and all other papers filed in the cause, the notice of appeal, and the undertaking filed; and the justice or judge may be compelled by the Superior Court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice or judge by the party or his attorney. In the Superior Court, either party may have the benefit of all legal objections made in the Justice's or Police Court. [Approved March 27, 1897; Stats. 1897, ch. 152.]

§ 978. An appeal from a Justice's or Police Court is not effectual for any purpose, unless an undertaking be filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on the appeal; or, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money; or twice the value of property, including costs, when the judgment is for the recovery of specific personal property, and must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from, and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the Superior Court. When the action is for the recovery of or to enforce or foreclose a lien on specific personal property, the undertaking must be conditioned that the appellant will pay

the judgment and costs appealed from, and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the Superior Court, and will obey any order made by the court therein. When the judgment appealed from directs the delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the appeal be dismissed or withdrawn, or the judgment affirmed, or judgment be recovered against him in the action in the Superior Court, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof; or that he will pay any judgment and costs that may be recovered against him in said action in the Superior Court, not exceeding a sum to be fixed by the justice of the court from which the appeal is taken, and which sum must be specified in the undertaking. A deposit of the amount of the judgment, including all costs appealed from or of the value of the property, including all costs in actions for the recovery of specific personal property, with the justice or judge, is equivalent to the filing of the undertaking, and in such cases, the justice or judge must transmit the money to the clerk of the Superior Court, to be by him paid out on the order of the court. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the ad-

verse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given. [Amendment approved March 26, 1880; Amendments 1880, p. 16. In effect March 26, 1880.]

Undertaking on appeal: Compare sec. 941.

Sureties, justification: Sec. 948; qualification: Sec. 1057.

§ 979. If an execution be issued on the filing of the undertaking staying proceedings, the justice or judge must, by order, direct the officer to stay all proceedings on the same. Such officer must, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon, and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same. [Amendment approved March 26, 1880; Amendments 1880, p. 17. In effect March 26, 1880.]

§ 980. Upon an appeal heard upon a statement of the case, the Superior Court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial. When the action is tried anew on appeal, the trial must be conducted in all respects as other trials in the Superior Court. The provisions of this Code as to changing the place of trial, and all the provisions as to trials in the Superior Court, are applicable to trials on apeal in the Superior Court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the Superior Court, after notice, may or-

der the appeal to be dismissed, with costs; and if it appear to such court that the appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding twenty-five per cent of the judgment appealed from. Judgments rendered in the Superior Court on appeal shall have the same force and effect, and may be enforced in the same manner, as judgments in actions commenced in the Superior Court. [Amendment approved March 26, 1880; Amendments 1880, p. 17. In effect March 26, 1880.]

The foregoing sections end chapter 3, which, with chapter 2 of title 12 of part 2, was entirely amended, and the foregoing chapters, 2 and 3, adopted as substitutes therefor, by act approved March 26, 1880; Amendments 1880, 14 (Ban. ed. 52); took effect immediately; repealed all acts and parts of acts in conflict therewith. Chapters 4 and 5, of title 13 of part 2, and each and every section thereof, relating to appeals from probate courts and appeals to county courts, were repealed by act approved April 15, 1880; Amendments 1880, 64 (Ban. ed. 238). Took effect immediately.

Amendments: Sec. 473.
Trial de novo: See ante, sec. 976.
New trial: See secs. 656 et seq.

TITLE XIII.

CHAPTERS IV, V.

The act is as follows:

An act to repeal chapters four and five, of title thirteen, of part two, of the Code of Civil Procedure, and each and every section of said chapters four and five, relating to appeals in civil actions. [Approved April 15, 1880.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

§ 1. Chapters four and five, of title thirteen, of part two, of the Code of Civil Procedure, and each and every section of said chapters four and five (secs. 969-980), are hereby repealed.

§ 2. This act shall take effect immediately.

TITLE XIV.

OF MISCELLANEOUS PROVISIONS.

Chapter I. Proceedings against joint debtors.
II. Offer of the defendant to compromise.
III. Inspection of writings.
IV. Motions and orders.
V. Notices, and filing, and service of papers.
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VII. General provisions.

CHAPTER I.

PROCEEDINGS AGAINST JOINT DEBTORS.

§ 989. Parties not summoned in action on joint contract may be summoned after judgment.
§ 990. Summons in that case, what to contain, and how served.
§ 991. Affidavit to accompany summons.
§ 992. Answer, when filed and what it may contain.
§ 993. What constitute the pleadings in the case.
§ 994. Issues, how tried. Verdict, what to be.

§ 989. When a judgment is recovered against one or more or several persons, jointly indebted upon an obligation, by proceeding, as provided in section four hundred and fourteen, those who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons.

Cognate provisions: Secs. 383, 414, 579.

Joining persons severally liable upon instrument: Sec. 383.

Summons served on one defendant out of sev-

eral, plaintiff may proceed against him alone: Sec. 414.

Judgment against some defendants, proceeding continuing against others: Sec. 579.

Release of one joint debtor does not discharge others: Civ. Code, sec. 1543.

§ 990. The summons, as provided in the last section, must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner and returnable within the same time as the original summons. It is not necessary to file a new complaint.

Summons, contents, service, etc.: Secs. 407, 410, et seq.

§ 991. The summons must be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon.

§ 992. Upon such summons, the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the statute of limitations.

Answer: Sec. 437, notes, et seq.

§ 993. If the defendant, in his answer, deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, constitute the written allegations in the case; if he deny his liability on the obligation upon which the judg-

ment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, constitute such written allegations.

§ 994. The issues formed may be tried as in other cases; but when the defendant denies, in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him it must be for not exceeding the amount remaining unsatisfied on such original judgment, with interest thereon.

Trial: Secs. 607-645.

CHAPTER II.

OFFER OF THE DEFENDANT TO COMPROMISE.

§ 997. Proceedings on offer of the defendant to compromise after suit brought.

§ 997. The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof, within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer. [Amendment approved March 24, 1874; Amendments 1873-4, p. 341. In effect July 1, 1874.]

Offer, not an admission: Sec. 2078; equivalent to tender, sec. 2074.

Judgment, by confession: Sec. 1132.

CHAPTER III.

INSPECTION OF WRITINGS.

§ 1000. A party may demand inspection and copy of a book, paper, etc.

§ 1000. Any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book, or the document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents, when he is examined as a witness. [Amendment approved April 15, 1880; Amendments 1880, p. 72. In effect April 15, 1880.]

Items of an account: Sec. 454.

Compelling production of books, etc.: Sec. 1985 et seq.; see, also, secs. 1938, 1939.

Contempt: Sec. 1209 et seq.

CHAPTER IV.

MOTIONS AND ORDERS.

§ 1003. Order and motion defined.
§ 1004. Motions and orders, where made.
§ 1005. Notice of motion, at what time to be given.
§ 1006. Transfer of motions and orders to show cause.
§ 1007. Order for payment of money, how enforced.

§ 1003. Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.

Order, vacating: Sec. 937; enforcement, sec. 128, subd. 4; renewing, application for, secs. 182, 183; final, effect of as estoppel, sec. 1908.

Motion, notice of, sec. 1005; heard before court commissioners, sec. 259, subd. 1.

§ 1004. Motions must be made in the county, or city and county, in which the action is pending. Orders made out of court may be made by the judge of the court in any part of the State. [Amendment approved March 10, 1880; Amendments 1880, p. 12. In effect March 10, 1880.]

Power of judge at chambers: Secs. 165, 166, 176; court commissioner's control of ex parte motions, sec. 259, subd. 1.

§ 1005. When a written notice of a motion is necessary, it must be given, if the court be held in the same county, or city and county, with both parties, five days before the time appointed for the hearing; otherwise, ten days. When the notice is served by mail, the number of days before the hearing must be increased one day for every twenty-five miles of distance between the place of deposit and the place of service; such increase,

however, not to exceed in all thirty days; but in all cases the court, or a judge thereof, may prescribe a shorter time. [Amendment approved March 10, 1880; Amendments 1880, p. 13. In effect March 10, 1880.]

Written, notice must be: Sec. 1010; order made without notice, sec. 937.

Service, of papers, generally: Sec. 1010 et seq.

§ 1006. When a notice of motion is given, or an order to show cause is made returnable, before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the judge is unable to hear the parties, the matter may be transferred by his order to some other judge, before whom it might originally have been brought.

Notice of motion: Sec. 1005.

§ 1007. Whenever an order for the payment of a sum of money is made by a court, pursuant to the provisions of this Code, it may be enforced by execution in the same manner as if it were a judgment.

Enforced by execution: Sec. 681 et seq.; contempt, sec. 1209 et seq.

CHAPTER V.

NOTICES, AND FILING AND SERVICE OF PAPERS.

§ 1010. Notices and papers, how served.
§ 1011. When and how served.
§ 1012. Service by mail, when.
§ 1013. Service by mail, how.
§ 1014. Appearance. Notices after appearance.
§ 1015. Service on non-residents. Where a party has an attorney, service shall be on such attorney.
§ 1016. Preceding provisions not to apply to proceeding to bring party into contempt.
§ 1017. Service by telegraph.

§ 1010. Notices must be in writing, and notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter, when not otherwise provided by this Code.

§ 1011. The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion, and if his residence be not known, then by putting the same, inclosed in an envelope, into the postoffice, directed to such attorney;

2. If upon a party, it may be made by leaving the notice or other paper at his residence, between

the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; and if his residence be not known, by putting the same, inclosed in an envelope, into the postoffice, directed to such party.

Service, on attorney: Sec. 1015.

§ 1012. Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication by mail. [Amendment approved March 24, 1874; Amendments 1873-4, p. 343. In effect July 1, 1874.]

§ 1013. In case of service by mail, the notice or other paper must be deposited in the postoffice, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of the deposit, but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address; such extension, however, not to exceed ninety days in all. [Amendment approved March 24, 1874; Amendments 1873-4, p. 343. In effect July 1, 1874.]

Distance: Sec. 1005.

§ 1014. A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice

is required to be given. But where a defendant has not appeared, service of notice of papers need not be made upon him unless he is imprisoned for want of bail.

Appearance, waiver of summons: Secs. 406, 416.
Notice of subsequent proceedings, how given: Sec. 1015.

§ 1015. When a plaintiff or a defendant, who has appeared, resides out of the State, and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt.

Attorney, authority of: Sec. 283; duties of, sec. 282; disbarred, when, see secs. 287 to 299.
Service, how made: Sec. 1011.
Exception of process and contempt: Sec. 1016.

§ 1016. The foregoing provisions of this chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

§ 1017. Any summons, writ, or order, in any civil suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy of such writ, or order, or paper, so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner, and with the same force and effect, in all respects, as the original thereof might be if de-

livered to him; and the officer or person serving or executing the same has the same authority, and is subject to the same liabilities, as if the copy were the original. The original, when a writ or order, must also be filed in the court from which it was issued, and a certified copy thereof must be preserved in the telegraph office from which it was sent. In sending it, either the original or the certified copy may be used by the operator for that purpose. Whenever any document to be sent by telegraph bears a seal, either private or official, it is not necessary for the operator, in sending the same, to telegraph a description of the seal, or any words or device thereon, but the same may be expressed in the telegraphic copy by the letters "L. S." or by the word "seal."

CHAPTER VI.

OF COSTS.

§ 1021. Compensation of attorneys. Costs to parties.
§ 1022. When allowed, of course, to the plaintiff.
§ 1023. Several actions brought on a single cause of action can carry costs in but one.
§ 1024. Defendant's costs must be allowed, of course, in certain cases.
§ 1025. Costs, when in the discretion of the court.
§ 1026. When the several defendants are not united in interest, costs may be served.
§ 1027. Costs of appeal discretionary with the court, in certain cases.
§ 1028. Referee's fees.
§ 1029. Continuance, costs may be imposed as condition of.
§ 1030. Costs when a tender is made before suit brought.
§ 1031. Costs in action by or against an administrator, etc.
§ 1032. Costs in a review other than by appeal.
§ 1033. Filing of, and affidavit, to bill of costs.
§ 1034. Costs on appeal, how claimed and recovered.
§ 1035. Interest and costs must be included by the clerk in the judgment.
§ 1036. When plaintiff is a non-resident or foreign corporation, defendant may require security for costs.
§ 1037. If such security be not given, the action may be dismissed.
§ 1038. Costs when State is a party.
§ 1039. Costs when county is a party.

§ 1021. The measure and mode of compensation of attorneys and counsellors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided.

Foreclosure, counsel fees on: Sec. 1500. See post appendix, p. 863.

Contested election, costs: See sec. 1125.

Eminent domain, costs: Sec. 1255. Action on fencing-bond, counsel fees: Sec. 1251.

Mechanics' liens.—Costs and counsel fees: Sec. 1195.

Partition.—Costs and counsel fees: Secs. 768, 796, 798, 801.

Probate matters.—Attorneys' fees: Sec. 1718. Costs as to homestead, etc.: Sec. 1485; revocation of probate: Sec. 1332.

Shorthand reporter's fees: Sec. 274.

Executor, etc.—Costs in actions against: Sec. 1509; on reference, sec. 1508; when claim allowed in part, sec. 1503; action by executor against estate, sec. 1510; winding up estate, sec. 1616.

§ 1022. Costs are allowed, of course, to the plaintiff, upon a judgment in his favor, in the following cases:

1. In an action for the recovery of real property:

2. In an action to recover the possession of personal property, where the value of the property amounts to three hundred dollars or over; such value shall be determined by the jury, court, or referee by whom the action is tried;

3. In an action for the recovery of money or damages, when plaintiff recovers three hundred dolars or over;

4. In aspecial proceeding;

5. In an action which involves the title or possession of real estate, or the legality of any tax, impost, assessment toll, or municipal fine.

Costs discretionary, when: Secs. 1025, 1027.

Subdivision 2. Personal property, value: Sec. 1025.

Subdivision 3. Money or damages: Sec. 1025.

Subdivision 4. Special proceeding, generally: Secs. 1063-1822.

Act requiring securityfor costs in libel and slander: See post, Appendix, p. 861.

§ 1023. When several actions are brought on one bond, undertaking, promissory note, bill of ex-

change, or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs can be allowed to the plaintiff in more than one of such actions, which may be at his election, if the party proceeded against in the other actions were, at the commencement of the previous action, openly within this State; but the disbursements of the plaintiff must be allowed to him in each action.

Several parties, who might have been joined as defendants: Sec. 383.

§ **1024.** Costs must be allowed, of course, to the defendant, upon a judgment in his favor in the actions mentioned in section ten hundred and twenty-two, and in special proceedings.

Special proceedings: Secs. 1063-1822.

§ **1025.** In other actions than those mentioned in section ten hundred and twenty-two, costs may be allowed or not, and, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court; but no costs can be allowed in an action for the recovery of money or damages when the plaintiff recovers less than three hundred dollars, nor in an action to recover the possession of personal property, when the value of the property is less than three hundred dollars.

Arbitration and award, costs on: See post, sec. 1286.

§ **1026.** When there are several defendants in the actions mentioned in section ten hundred and twenty-two, not united in interest, and making separate defenses by separate answers, and plaintiff fails to recover judgment against all, the

court must award costs to such of the defendants as have judgment in their favor.

Judgment for some defendants: Sec. 578.
Several defendants: See sec. 1023.

§ 1027. In the following cases, the costs of appeal are in the discretion of the court:

1. When a new trial is ordered;
2. When a judgment is modified.

§ 1028. The fees of referees are five dollars to each for every day spent in the business of the reference; but the parties may agree, in writing, upon any other rate of compensation, and thereupon such rate shall be allowed.

Reference, generally: Secs. 638-645.
Referees in partition, compensation of: Secs. 768, 796.

§ 1029. When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same.

Postponement, generally: Secs. 595, 596.

§ 1030. When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action, he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court for plaintiff the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.

Tender: Sec. 2076.
Offer to compromise: Sec. 997.
Deposit in court: Secs. 572-574; sec. 1024.

§ 1031. In an action prosecuted or defended by an executor, administrator, trustee of express trust, or a person expressly authorized by statute, costs may be recovered as in action by and against a person prosecuting or defending, in his own right; but such costs must by the judgment be made chargeable only upon the estate, fund, or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defense.

Costs against executor, etc.: Secs. 1508, 1509.

§ 1032. When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case.

Special proceedings, generally: Secs. 1063-1822.

Decision of inferior court reviewed: Secs. 1067-1110.

Costs on appeal: Secs. 1027, 1034.

§ 1033. The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict or notice of the decision of the court or referee—or, if the entry of the judgment on the verdict or decision be stayed, then before such entry is made—a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and be-

lief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed, may, within five days after notice of filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers. [Amendment approved March 24, 1874; Amendments 1873-4, p. 343. In effect July 1, 1874.]

Shorthand reporter's fees: Sec. 274.

§ 1034. Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed by the preceding section, and thereafter he may have an execution therefor as upon a judgment.

Remittitur: Sec. 958.

§ 1035. The clerk must include in the judgment entered up by him, any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank, left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and docket of the judgment.

§ 1036. When the plaintiff in an action resides out of the State, or is a foreign corporation, security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action must be stayed until an undertaking, executed by two or more persons, is filed

with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking is executed and filed.

Qualification of sureties: Sec. 1057.

§ **1037.** After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action to be dismissed.

§ **1038.** When the State is a party, and costs are awarded against it, they must be paid out of the State treasury.

No security required of State: Sec. 1058.

§ **1039.** When a county is a party, and costs are awarded against it, they must be paid out of the county treasury.

No security required of county: Sec. 1058.

CHAPTER VII.

GENERAL PROVISIONS.

§ 1045. Lost papers, how supplied.
§ 1046. Papers without the title of the action, or with defective title, may be valid.
§ 1047. Successive actions on the same contract, etc.
§ 1048. Consolidation of several actions into one.
§ 1049. Actions, when deemed pending.
§ 1050. Actions to determine adverse claims, and by sureties.
§ 1051. Testimony, when to be taken by the clerk.
§ 1052. The clerk must keep a register of actions.
§ 1053. Two or three referees, etc., may do any act.
§ 1054. The time within which an act is to be done may be extended.
§ 1055. Actions against a sheriff for official acts.
§ 1056. Actions may be prosecuted in the Spanish language in certain counties.
§ 1057. Undertaking mentioned in this Code, requisites of.
§ 1058. People of State not required to give bonds when State is a party.
§ 1059. Surety on appeal substituted to rights of judgment creditor.

§ 1045. If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.

Lost certificates of deposit, statute relating to actions on: See post, Appendix, p. 874.

§ 1046. An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.

§ 1047. Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom.

Action defined: Sec. 22.

§ 1048. Whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.

§ 1049. An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

§ 1050. An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as a surety.

Quieting title to realty: Sec. 738.

§ 1051. On the trial of an action in a court of record, if there is no shorthand reporter of the court in attendance, either party may require the clerk to take down the testimony in writing.

§ 1052. The clerk must keep among the records of the court a register of actions. He must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein.

Records of the court: See secs. 668, 672, 683.

§ 1053. When there are three referees, or three arbitrators, all must meet, but two of them may do any act which might be done by all.

References and trials by referees: Secs. 638-645.

§ 1054. When an act to be done, as provided in this Code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of statements, or of bills of exceptions, or of amendments thereto, or to the service of notices other than of appeal, the time allowed by this Code may be extended, upon good cause shown, by the judge of the Superior Court in and for the county in which the action is pending, or by the judge who presided at the trial of said action; but such extension shall not exceed thirty days, without the consent of the adverse party; except that when it appears to the judge to whom said application is made, that the attorney of record for the party applying for said extension is actually engaged in attendance upon a session of the legislature of this State, as a member thereof; in which case it shall be the duty of said judge to extend said time until said session of the legislature adjourns, and thirty days thereafter. [Amendment approved January 31, 1895; Stats. 1895, p. 12. In effect January 31, 1895.]

Time, order extending.—Time, generally: Secs. 10-13.

Computation of time: See ante, sec. 12.

§ 1055. If an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties; and the court may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs. [Amendment approved April 15, 1880; Amendments 1880, p. 73. In effect April 15, 1880.]

§ 1056. In all cases where an undertaking or bond, with any number of sureties, is authorized or required by any provision of this Code, or of any law of this State, any corporation with a paid up capital of not less than one hundred thousand dollars, incorporated under the laws of this or any other State of the United States for the purpose of making, guaranteeing, or becoming a surety upon bonds or undertakings required or authorized by law, or which, by the laws of the State where it was originally incorporated has such power, and which shall have complied with all the requirements of the law of this State regulating the formation or admission of these corporations to transact such business in this State, may become and shall be accepted as security or as sole and sufficient surety upon such undertaking or bond, and such corporate surety shall be subject to all the liabilities and entitled to all the rights of natural persons' sureties; provided, that the insurance commissioner shall have the same jurisdiction and powers to examine the affairs of such corporations as he has in other cases; shall require them to file similar statements and issue to them a similar certificate. And whenever the liabilities of any such corporation shall exceed its assets, the insurance commissioner shall require the deficiency to be paid up in sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency, and he shall publish the same once a week for three weeks, in a daily San Francisco paper. And, until such deficiency is paid up, such company shall not do business in this State. In estimating the condition of any such company, the commissioner shall allow as assets only such as are allowed under existing laws at the time, and shall charge as liabilities, in addition of eighty per

cent of the capital stock, all outstanding indebtedness of the company, and a premium reserve equal to fifty per centum of the premiums charged by said company on all risks then in force. [New section added March, 1889; Stats. 1889, p. 215. In effect March 16, 1889.]

Section 1056, relating to prosecuting actions in the Spanish language in certain counties, was repealed by act of April 16, 1880; Amendments 1880, 111 (Ban. ed. 347). Took effect immediately.

§ **1057.** In any case where an undertaking or bond is authorized or required by any law of this State, the officer taking the same must, except in the case of such a corporation as is mentioned in the next preceding section, require the sureties to accompany it with an affidavit that they are each residents and householders, or freeholders, within the State, and are each worth the sum specified in the undertaking or bond, over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking or bond exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than the amount specified in the undertaking or bond, if the whole amount be equivalent to that of two sufficient sureties. Any corporation such as is mentioned in the next preceding section, may become one of such sureties. No such corporation shall be accepted in any case as a surety whenever its liabilities shall exceed its assets as ascertained in the manner provided in section ten hundred and fifty-six. [Amendment approved March 16, 1889; Amendments 1889, p. 216. In effect March 16, 1889.]

Property exempt from execution: Sec. 690.

Applied to guardians: Sec. 1809.

§ 1058. In any civil action or proceeding wherein the State, or the people of the State, is a party plaintiff, or any State officer, in his official capacity, or in behalf of the State, or any county, city and county, city, or town, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the State, or the people thereof, or any officer thereof, or of any county, city and county, city, or town; but on complying with the other provisions of this Code, the State, or the people thereof, or any State officer acting in his official capacity, have the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this Code. [New section approved April 15, 1880; Amendments 1880, p. 76. In effect April 15, 1880.]

Costs against State or county: Secs. 1038, 1039.

§ 1059. Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor, and is entitled to control, enforce, and satisfy such judgment in all respects as if he had recovered the same. [New section approved March 24, 1874; Amendments 1873-4, p. 344. In effect July 1, 1874.]

PART III.

OF SPECIAL PROCEEDINGS OF A CIVIL NATURE.

Title I. Of Writs of Mandate and Prohibition, §§ 1067-1110.
II. Of Contesting Elections. §§ 1111-1127.
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IV. Of Enforcement of Liens, §§ 1180-1206.
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PRELIMINARY PROVISIONS.

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Plaintiff and defendant: Sec. 308.

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TITLE I.

OF WRITS OF REVIEW, MANDATE AND PROHIBITION.

Chapter I. Writ or review.
II. Writ of mandate.
III. Writ of prohibition.
IV. Writs of review, mandate, and prohibition may issue and be heard at chambers.
V. Rules of practice and appeals.

CHAPTER I.

WRIT OF REVIEW.

§ 1067. Writ of review defined.
§ 1068. When and by what courts granted.
§ 1069. Application for, how made.
§ 1070. The writ to be directed to the inferior tribunal, etc.
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§ 1072. Proceedings in inferior court may be stayed, or not.
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§ 1077. Judgment rolls.

§ **1067.** The writ of certiorari may be denominated the writ of review. [Amendment approved

March 24, 1874; Amendments 1873-4, p. 345. In effect July 1, 1874.]

§ 1068. A writ of review may be granted by any court, except a police or justice's court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.

Certiorari, extent of review on: Sec. 1074.

Supreme Court is always open for issuing this writ: Sec. 47.

Court commissioners, power to hear and determine ex parte motions for writ: Sec. 259.

Returnable.—Writ may be made returnable at any time: Sec. 1108. See sec. 1070.

§ 1069. The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

Application, Supreme Ct. rule 28.

Issuance, only upon order of the court, Supreme Ct. rule 23.

§ 1070. The writ may be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.

§ 1071. The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings

(describing or referring to them with convenient certainty), that the same may be reviewed by the court; and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed.

At specified time, see Supreme Ct. rule 23.

§ 1072. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted, in the sound discretion of the court; but if omitted, the power of the inferior court or officer is not suspended or the proceedings stayed.

§ 1073. The writ must be served in the same manner as a summons in civil action, except when otherwise expressly directed by the court.

Service of writ, on public tribunal, etc., and proof of same, Supreme Ct. rule 28.

Service of summons: Sec. 410 et seq.

§ 1074. The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer.

§ 1075. If the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming, or annulling, or modifying the proceedings below.

§ 1076. A copy of the judgment, signed by the clerk, must be transmitted to the inferior tribunal, board, or officer having the custody of the record or proceeding certified up.

§ 1077. A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitute the judgment roll.

Appeal: Sec. 939.

CHAPTER II.

WRIT OF MANDATE.

§ 1084. Mandate defined.
§ 1085. When and by what court issued.
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§ 1088. If the application be without notice, the alternative writ may issue; otherwise, the peremptory. Notice and default.
§ 1089. The adverse party may answer under oath.
§ 1090. If an essential question of fact is raised, the court may order a jury trial.
§ 1091. The applicant may demur to the answer or countervail it by proof.
§ 1092. Motion for new trial, where made.
§ 1093. The clerk must transmit the verdict to the court where the motion is pending, after which the hearing shall be had on motion.
§ 1094. If no answer be made, or if the answer raise no material issue of fact, the hearing must be before the court.
§ 1095. If the applicant succeed, he may have damages, costs, and a peremptory mandate.
§ 1096. Service of the writ.
§ 1097. Penalty for disobedience to the writ.

§ 1084. The writ of mandamus may be denominated a writ of mandate. [Amendment approved March 24, 1874; Amendments 1873-4, p. 345. In effect July 1, 1874.]

§ 1085. It may be issued by any court, except a justice's or police court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law, specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to

the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

Supreme Court always open: Sec. 47.

Superior Court always open: Sec. 73. Hearing, etc., at chambers: Sec. 166.

Court commissioners, power to hear and determine ex parte motions for writ: Sec. 259.

Returnable, when may be made: Sec. 1108.

§ 1086. The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon affidavit, on the application of the party beneficially interested.

Issued, Supreme Court, see Supreme Ct. rule 28.

§ 1087. The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a specified time and place, why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted, and a return day inserted.

Peremptory writ, without alternative: Sec. 1088; Supreme Ct. rule 28.

Alternate writ, Supreme Court rule 31.

§ 1088. When the application to the court is made without notice to the adverse party, and the writ be allowed, the alternative must be first issued; but if the application be upon due notice,

and the writ be allowed, the peremptory may be issued in the first instance. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not.

Proof of service, on public body, Supreme Ct. rule 28.

§ 1089. On the return of the alternative, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.

Answer: Sec. 437.

§ 1090. If an answer be made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

§ 1091. On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof, either in direct denial or by way of avoidance.

§ 1092. The motion for a new trial must be made in the court in which the issue of fact is tried.

§ 1093. If no notice of a motion for a new trial be given, or, if given, the motion be denied, the clerk, within five days after rendition of the verdict or denial of the motion, must transmit to the court in which the application for the writ is pending, a certified copy of the verdict attached to the order of trial; after which either party may bring on the argument of the application, upon reasonable notice to the adverse party.

§ 1094. If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case. [Amendment approved March 24, 1874; Amendments 1873-4, p. 345. In effect July 1, 1874.]

§ 1095. If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referees, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay.

Costs: Secs. 1021 et seq.

§ 1096. The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body, is service upon the board

or body, whether at the time of the service the board or body was in session or not.

Service of summons: Secs. 410 et seq.

§ 1097. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ. [Amendment approved March 24, 1874; Amendments 1873-4, p. 345. In effect July 1, 1874.]

Contempt, generally: Sec. 1209 et seq.

CHAPTER III.

WRIT OF PROHIBITION.

§ 1102. Prohibition defined.
§ 1103. Where and when issued.
§ 1104. Writ may be alternative or peremptory. Form of.
§ 1105. Certain provisions of the preceding chapter applicable.

§ 1102. The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person. [Amendment approved

March 3, 1881; Stats. 1881, p. 20. In effect March 3, 1881.]

Mandate: Sec. 1104 et seq.

§ 1103. It may be issued by any court except police or justices' courts, to an inferior tribunal or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.

Mandate: Secs. 1084 et seq.
Seal necessary to a writ: Sec. 152.

§ 1104. The writ must be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the pary to show cause why he should not be absolutely restrained, etc., must be omitted, and a return day inserted.

Compare sec. 1087.

§ 1105. The provisions of the preceding chapter, except of the four first sections thereof, apply to this proceeding.

CHAPTER IV.

WRITS OF REVIEW, MANDATE, AND PROHIBITION MAY ISSUE AND BE HEARD AT CHAMBERS.

§ 1108. Writs of review, mandate, and prohibition may issue and be heard at chambers.

§ 1108. Writs of review, mandate, and prohibition issued by the Supreme Court, or by a Superior Court, may, in the discretion of the court issuing the writ, be made returnable and a hearing thereon be had at any time. [Amendment approved April 15, 1880; Amendments 1880, p. 73. In effect April 15, 1880.]

Powers of judges at chambers: Secs. 165, 166.

CHAPTER V.

RULES OF PRACTICE AND APPEALS.

§ 1109. Certain provisions of part two applicable.
§ 1110. Same.

§ 1109. Except as otherwise provided in this title, the provisions of part two of this Code, are applicable to, and constitute the rules of practice in the proceedings mentioned in this title.

See ante, secs. 307 et seq.

§ 1110. The provisions of part two, of this Code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title.

See secs. 656 et seq.; and secs. 936 et seq.

TITLE II.

OF CONTESTING CERTAIN ELECTIONS.

§ 1111. Who may contest, and grounds of contest.
§ 1112. Irregularity and improper conduct of judges, when to annul elections.
§ 1113. When not to.
§ 1114. Illegal votes, when not to vitiate election.
§ 1115. Proceedings on contest.
§ 1113. Statement of cause of contest. When based on reception of illegal votes, contestant to deliver to respondent a list of votes claimed to be illegal.
§ 1117. Statement of cause of contest; want of form not to vitiate.
§ 1118. County judge to hold special term for trial of contest.
§ 1119. Clerk to issue citation to respondent.
§ 1120. Witnesses—attendance of, how enforced.
§ 1121. Power of court. Adjournment of court.
§ 1122. Rules to govern court in trial of contest.
§ 1123. Court may declare who was elected.
§ 1124. Fees of officers and witnesses.
§ 1125. Costs.
§ 1126. Appeal.
§ 1127. When election void and office vacant.

§ 1111. Any elector of a county, city and county, city, or of any political subdivision of either, may contest the right of any person declared elected to an office to be exercised therein, for any of the following causes:

1. For malconduct on the part of the board of judges, or any member thereof;

2. When the person whose right to the office is contested was not, at the time of the election, eligible to such office;

3. When the person whose right is contested has given to any elector or inspector, judge, or clerk of the election, any bribe or reward, or has offered any such bribe or reward for the purpose of procuring his election, or has committed any other of-

fense against the elective franchise, defined in title four, part one, of the Penal Code;

4. On account of illegal votes. [Amendment approved March 11, 1876; Amendments 1875-6, p. 100.]

Malconduct of judges: Secs. 1112, 1115.

Legislature, contesting election of members of: Polit. Code, sec. 273; of governor, etc., Id., sec. 288.

Office, usurpation of, etc.: Sec. 802.

Subd. 3. Offense against elective franchise: Pen. Code, secs. 41 et seq.

§ 1112. No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected, when he had not received the highest number of legal votes.

§ 1113. When any election held for an office exercised in and for a county is contested on account of any malconduct on the part of the board of judges of any township election, or any member thereof, the election cannot be annulled and set aside upon any proof thereof, unless the rejection of the vote of such township or townships would change the result as to such office in the remaining vote of the county.

§ 1114. Nothing in the fourth ground of contest specified in section eleven hundred and eleven, is to be so construed as to authorize an election to be set aside on account of illegal votes, unless it appear that a number of illegal votes has been given to the person whose right to the office is con-

tested, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to such other person.

§ 1115. When an elector contests the right of any person declared elected to such office, he must, within forty days after the return day of the election, file with the county clerk a written statement, setting forth specifically:

1. The name of the party contesting such election, and that he is an elector of the district, county, or township, as the case may be, in which such election was held;
2. The name of the person whose right to the office is contested;
3. The office;
4. The particular grounds of such contest.

Which statement must be verified by the affidavit of the contesting party, that the matters and things therein contained are true.

Statement of contestant: See secs. 1116, 1117.

Abbreviations and numerals: Sec. 186.

§ 1116. When the reception of illegal votes is alleged as a cause of contest, it is sufficient to state generally that in one or more specified voting precincts illegal votes were given to the person whose election is contested, which, if taken from him, will reduce the number of his legal votes below the number of legal votes given to some other person for the same office; but no testimony can be received of any illegal votes, unless the party contesting such election deliver to the opposite party, at least three days before such trial, a written list of the number of illegal votes, and by whom given,

which he intends to prove on such trial; and no testimony can be received of any illegal votes except such as are specified in such list [Amendment approved April 15, 1880; Amendments 1880, p. 74. In effect April 15, 1880.]

§ 1117. No statement of the grounds of contest will be rejected, nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested.

§ 1118. Upon the statement being filed, the county clerk must inform the Superior Court of the county thereof, which shall thereupon order a special session of such court to be held at the court room, on some day to be named by it, not less than ten nor more than twenty days from the date of such order, to hear and determine such contested election. [Amendment approved April 15, 1880; Amendments 1880, p. 75. In effect April 15, 1880.]

§ 1119. The clerk shall thereupon issue a citation for the person, whose right to the office is contested, to appear at the time and place specified in the order, which citation must be delivered to the sheriff, and served either upon the party in person, or, if he cannot be found, by leaving a copy thereof at the house where he last resided, at least five days before the time so specified. [Amendment approved April 15, 1880; Amendments 1880, p. 75. In effect April 15, 1880.]

§ 1120. The clerk must issue subpoenas for witnesses at the request of either party, which must be served as other subpoenas; and the Superior Court shall have full power to issue attach-

ments to compel the attendance of witnesses who have been subpoenaed to attend. [Amendment approved April 15, 1880; Amendments 1880, p. 75. In effect April 15, 1880.]

Subpoenas, issuance, service, etc.: Secs. 1985-1987; also see secs. 1988-1990; disobedience, penalty, etc., secs. 1991-1992.

Compelling attendance of witnesses: Sec. 1993 et seq.

§ 1121. The court must meet at the time and place designated, to determine such contested election, and shall have all the powers necessary to the determination thereof. It may adjourn from day to day until such trial is ended, and may also continue the trial, before its commencement, for any time not exceeding twenty days, for good cause shown by either party upon affidavit, at the costs of the party applying for such continuance.

§ 1122. The court must be governed, in the trial and determination of such contested election, by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable; and may dismiss the proceedings if the statement of the cause or causes of the contest is insufficient, or for want of prosecution. After hearing the proofs and allegations of the parties, the court must pronounce judgment in the premises, either confirming or annulling and setting aside such election.

§ 1123. If in any such case it appears that another person than the one returned has the highest number of legal votes, the court must declare such person elected.

§ 1124. [Repealed April 15, 1880; Amendments 1880, p. 76.]

§ 1125. If the proceedings are dismissed for insufficiency, or want of prosecution, or the election is by the court confirmed, judgment must be rendered against the party contesting such election, for costs, in favor of the party whose election was contested; but if the election is annulled and set aside, judgment for costs must be rendered against the party whose election was contested, in favor of the party contesting the same. Primarily, each party is liable for the costs created by himself, to the officers and witnesses entitled thereto, which may be collected in the same manner as similar costs are collected in other cases. [Amendment approved April 15, 1880; Amendments 1880, p. 75. In effect April 15, 1880.]

Costs, in special proceedings: Secs. 1022, subd. 4, 1024; generally, sec. 1021 et seq.

§ 1126. Either party, aggrieved by the judgment of the court, may appeal therefrom to the Supreme Court, as in other cases of appeal thereto from the Superior Court. [Amendment approved April 15, 1880; Amendments 1880, p. 75. In effect April 15, 1880.]

Appeals to Supreme Court: Sec. 963; appeals, generally, sec. 936 et seq.; from county court, sec. 966.

§ 1127. Whenever an election is annulled or set aside by the judgment of the Superior Court, and no appeal has been taken within ten days thereafter the commission, if any has issued, is void, and the office vacant. [Amendment approved April 15, 1880; Amendments 1880, p. 75. In effect April 15, 1880.]

TITLE III.

OF SUMMARY PROCEEDINGS.

Chapter I. Confession of judgment without action.
II. Submitting a controversy without action.
III. Discharge of persons imprisoned on civil process.
IV. Summary proceedings for obtaining possession of real property in certain cases.

CHAPTER I.

CONFESSION OF JUDGMENT WITHOUT ACTION.

§ 1132. Judgment may be confessed for debt due or contingent liability.
§ 1133. Statement in writing and form thereof.
§ 1134. Filing statement and entering judgment.
§ 1135. How, in Justices' Courts.

§ 1132. A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any court having jurisdiction for like amounts.

Judgment by confession: Sec. 1133; in justice's court, secs. 889, 1135.

§ 1133. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

1. It must authorize the entry of judgment for a specified sum;

2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due;

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

§ 1134. The statement must be filed with the clerk of the court in which the judgment is to be entered, who must indorse upon it, and enter in the judgment book, a judgment of such court for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment indorsed thereupon, becomes the judgment roll.

§ 1135. In a justice's court, where the court has authority to enter the judgment, the statement may be filed with the justice, who must thereupon enter in his docket a judgment of his court for the amount confessed, with three dollars costs. If a transcript of such judgment be filed with the county clerk, a copy of the statement must be filed with it.

Justice's court.—A justice has power to take and enter judgment on confession when the amount confessed, exclusive of interest, does not amount to three hundred dollars: Sec. 112, subd. 6; secs. 114, 889.

CHAPTER II.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

§ 1138. Controversy, how submitted without action.
§ 1139. Judgment on, as in other cases, but without costs prior to notice of trial.
§ 1140. Judgment may be enforced or appealed from as in an action.

§ 1138. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction, if an action had been brought; but it must appear, by affidavit, that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The court must thereupon hear and determine the case, and render judgment thereon, as if an action were depending.

Relief. Sec. 580.

§ 1139. Judgment must be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment, constitute the judgment roll.

Entry of judgment: Sec. 664.
Judgment roll: Sec. 670.

§ 1140. The judgment may be enforced in the same manner as if it had been rendered in an action, and is in the same manner subject to appeal.

Enforcement of judgment: Sec. 684.
Appeals: Sec. 936 et seq.

CHAPTER III.

DISCHARGE OF PERSONS IMPRISONED ON CIVIL PROCESS.

§ 1143. Persons confined may be discharged.
§ 1144. Notice of application.
§ 1145. Service of notice.
§ 1146. Examination before judge.
§ 1147. Interrogatories may be in writing.
§ 1148. Oath to be administered.
§ 1149. Order of discharge.
§ 1150. If not discharged, prisoner may again apply, when.
§ 1151. Discharge final.
§ 1152. Judgment remains in force.
§ 1153. Plaintiff may order discharge of the prisoner, who shall not thereafter be liable to imprisonment for the same cause of action.
§ 1154. Plaintiff to advance funds for support of prisoner.

§ 1143. Any person confined in jail on an execution issued on a judgment rendered in a civil action, must be discharged therefrom upon the conditions in this chapter specified.

§ 1144. Such person must cause a notice in writing to be given to the plaintiff, his agent, or attorney, that at a certain time and place he will apply to a judge of the Superior Court of the county in which such person may be confined for the purpose of obtaining a discharge from his imprisonment. [Amendment approved April 16, 1880; Amendments 1880, 114. In effect April 16 1880.]

Notices: Sec. 1010 et seq.

§ 1145. Such notice must be served upon the plaintiff, his agent or attorney, one day at least before the hearing of the application.

Service of notice: Sec. 1015.

§ 1146. At the time and place specified in the notice, such person must be taken before such judge, who must examine him under oath concerning his estate and property and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed; and such judge may also hear any other legal and pertinent evidence that may be produced by the debtor or the creditor.

§ 1147. The plaintiff in the action may, upon such examination, propose to the prisoner any interrogatories pertinent to the inquiry; and they must, if required by him, be proposed and answered in writing, and the answer must be signed and sworn to by the prisoner.

§ 1148. If, upon the examination, the judge is satisfied that the prisoner is entitled to his discharge, he must administer to him the following oath, to-wit: "I, —— ——, do solemnly swear that I have not any estate, real or personal, to the amount of fifty dollars, except such as is by law exempted from being taken in execution; and that I have not any other estate now conveyed or concealed, or in any way disposed of, with design to secure the same to my use, or to hinder, delay, or defraud my creditors: so help me God."

§ 1149. After administering the oath, the judge must issue an order that the prisoner be discharged from custody, and the officer, upon the service of such order, must discharge the prisoner forthwith, if he be imprisoned for no other cause.

§ 1150. If such judge does not discharge the prisoner, he may apply for his discharge at the end of every succeeding ten days, in the same

manner as above provided, and the same proceedings must thereupon be had.

§ 1151. The prisoner, after being so discharged, is forever exempted from arrest or imprisonment for the same debt, unless he be convicted of having willfully sworn falsely upon his examination before the judge, or in taking the oath before prescribed.

§ 1152. The judgment against any prisoner who is discharged remains in full force against any estate which may then or at any time afterward belong to him, and the plaintiff may take out a new execution against the goods and estate of the prisoner, in like manner as if he had never been committed.

§ 1153. The plaintiff in the action may at any time order the prisoner to be discharged, and he is not thereafter liable to imprisonment for the same cause of action.

§ 1154. Whenever a person is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor, his agent or attorney, must advance to the jailer, on such commitment, sufficient money for the support of the prisoner for one week, and must make the like advance for every successive week of his imprisonment, and in case of failure to do so, the jailer must forthwith discharge such prisoner from custody; and such discharge has the same effect as if made by order of the creditor.

CHAPTER IV.

SUMMARY PROCEEDINGS FOR OBTAINING POSSESSION OF REAL PROPERTY IN CERTAIN CASES.

§ 1159. Forcible entry defined.
§ 1160. Forcible detainer defined.
§ 1161. Unlawful detainer defined.
§ 1162. Service of notice.
§ 1163. County Courts have jurisdiction.
§ 1164. Parties defendant.
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§ 1166. Complaint. Judge to fix day for appearance of defendant and summons.
§ 1167. Summons, form and service of.
§ 1168. Arrest.
§ 1169. Judgment by default.
§ 1170. Defendant may appear, etc.
§ 1171. Trial by jury.
§ 1172. Showing required of plaintiff in forcible entry or detainer. Of defendant.
§ 1173. Complaint must be amended in certain cases.
§ 1174. Verdict and judgment.
§ 1175. Verification of complaint and answer.
§ 1176. Effect of an appeal upon the judgment.
§ 1177. Rules of practice.
§ 1178. Appeals, how taken, etc.
§ 1179. Relief against forfeiture of lease.

§ 1159. Every person is guilty of a forcible entry who either—

1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, enters upon or into any real property; or,

2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession.

Proof required: Sec. 1172.

Parties defendant: Secs. 1164, 1165.

Force as element: See infra.

Previous statutory provisions.—"See Stats. 1866, p. 768, sec. 1. This chapter, relating to forcible entries, forcible detainers, and unlawful detainers, is drawn partly from Stats. 1865-6, 768, and also Stats. 1863, 652. An act concerning forcible entries and unlawful detainers was passed by Stats. 1850, 425, amended by Stats. 1852, 158, also by Stats. 1858, 90, also by Stats. 1861, 582, and again by Stats. 1862, 420; but these acts were repealed by Stats. 1863, 652. The decisions cited in this chapter, which were rendered prior to the thirty-second volume of reports, were rendered under Stats. 1850, 425, and acts amendatory thereof. Those rendered since that volume were given under the acts of 1863, p. 652, and 1866, p. 768. All these decisions bear more or less upon the provisions of this chapter, which, in most respects, is very similar to the previous statutes": Commissioners' note.

§ 1160. Every person is guilty of a forcible detainer who either—

1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,

2. Who, in the night time, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days refuses to surrender the same to such former occupant.

The occupant of real property, within the meaning of this subdivision, is one who within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands.

§ **1161.** A tenant of real property, for a term less than life, is guilty of unlawful detainer:

1. When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of his landlord, or the successor in estate of his landlord, if any there be; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

2. Where he continues in possession, in person or by subtenant, without permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him, and if there be a subtenant in actual occupation of the premises, also upon such subtenant. Such notice may be served at any time within one year after the rent becomes due. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of his term without any demand of possession or notice to quit by the landlord, or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of the landlord, or the successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year.

3. When he continues in possession, in person

or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and if there be a subtenant in actual occupation of the premises, also upon such subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture. A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to an under-tenant, in case of his unlawful detention of the premises underlet to him.

4. Any tenant or subtenant assigning or subletting or committing waste upon the demised premises, contrary to the covenants of his lease, thereby terminates the lease, and the landlord, or his successor in estate, shall, upon service of three days' notice to quit, upon the person or persons in possession, be entitled to restitution of possession of such demised premises under the provisions of this act. [Amendment approved April 1, 1878; Amendments 1877-8, 104. Took effect from passage.]

On the same day that the foregoing amendment of section 1161 was approved, another amendment of the same section was approved, as follows:

§ 1161. A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

1. When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without permission of his landlord; but in case of tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

2. Where he continues in possession, in person or by subtenants, without permission of his landlord,after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him; and if there be a subtenant in actual occupation of the premises, also upon subtenant. Such notice may be served at any time within one year after the rent becomes due. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of his term, without any demand of possession or notice to quit by the landlord, he shall be deemed to be holding by permission of the landlord, and shall be entitled to hold, under the terms of the lease, for another full year, and shall not be deemed guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent, on the part of a tenant, to hold for another year.

3. When he continues in possession, in person or by subtenants, after a neglect or a failure to perform other conditions or covenants of the lease or agreement under which the property is held, than the one for the payment of rent, and three

days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him; and if there be a subtenant in actual occupation of the premises, also upon such subtenant. Within three days after the service of the notice, the tenant or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in the continuance, may perform the conditions or covenants of the lease, or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the covenants and conditions of lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to said lessee or his subtenant demanding the performance of the violated covenant or conditions of the lease. A tenant may take proceedings similar to those prescribed in this chapter to obtain possession of the premises let to an under-tenant, in case of his unlawful detention of the premises underlet to him. [Amendment approved April 1, 1878; Amendments 1877-8, 106. Took effect from passage.]

§ 1162. The notices required by the preceding section may be served either:

1. By delivering a copy to the tenant personally: or,

2. If he be absent from his place of residence, and from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his place of residence; or,

3. If such place of residence and business cannot be ascertained, or a person of suitable age or discretion there cannot be found, then by affixing

a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner. [Amendment approved March 24, 1874; Amendments 1873-4, 347. In effect July 1, 1874.]

§ 1163. The Superior Court of the county in which the property, or some part of it, is situated, shall have jurisdiction of proceedings under this chapter; provided, that justices' courts, within their respective townships, or cities, or cities and counties shall have concurrent jurisdiction with the Superior Courts in cases of forcible entry and detainer, when the rental value does not exceed twenty-five dollars per month, and when the whole amount of damages claimed does not exceed two hundred dollars. [Amendment approved March 9, 1880; Amendments 1880, 8. In effect March 9, 1880.]

Concurrent jurisdiction of justices' court: Sec. 113, subd. 1.

§ 1164. No person other than the tenant of the premises and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be nonsuited for the nonjoinder of any person who might have been made party defendant; but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him. In case a defendant has become a subtenant of the premises in controversy, after the service of the notice

provided for by part two of section eleven hundred and sixty-one of this Code, upon the tenant of the premises, the fact that such notice was not served on each subtenant shall constitute no defense to the action. In case a married woman be a tenant, or a subtenant, her coverture shall constitute no defense; but in case her husband be not joined, or unless she be doing business as a sole trader, an execution issued upon a personal judgment against her can only be enforced against property on the premises at the commencement of the action. All persons who enter the premises under the tenant, after the commencement of the suit, shall be bound by the judgment, the same as if he or they had been made party to the action. [Amendment approved March 14, 1885; Amendments 1885, 129.]

Parties plaintiff, and generally: Sec. 1165.

§ 1165. Except as provided in the preceding section the provisions of part two of this Code, relating to parties to civil actions, are applicable to this proceeding.

See secs. 367 et seq., ante.

Parties defendant: Sec. 1164.

§ 1166. The plaintiff, in his complaint, which shall be in writing, must set forth the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry or forcible or unlawful detainer and claim damages therefor. In case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent. Upon filing the complaint, a summons must be is-

sued thereon as in other cases, returnable at a day designated therein, which shall not be less than three days, nor more than twelve days from its date, except in cases when the publication of the summons is necessary, in which case the court or a judge or justice thereof, may order that the summons be made returnable at such time, as may be deemed proper, and the summons shall specify the return day so fixed. [Amendment approved March 14, 1885; Stats. 1885, 129. In effect March 9, 1880.]

Damages: Sec. 1174.
Amendment: Secs. 472, 473, 1172.
Abbreviations and numerals: Sec. 186.
Verification: Secs. 1175, 446.
Parties: Secs. 1164, 1165.

§ 1167. The summons must state the parties to the proceeding, the court in which the same is brought, the nature of the action, in concise terms, and the relief sought, and also the return day, and must notify the defendant to appear and answer within the time designated, or that the relief sought will be taken against him. The summons must be directed to the defendant, and be served at least two days before the return day designated therein, and must be served and returned in the same manner as summons in civil actions is served and returned. Upon the return of any summons issued under this chapter, where the same has not, for any reason, been served, or not served in time, the plaintiff may have a new summons issued, the same as if no previous summons had been issued. [Amendment approved March 9, 1880; Amendments 1880, 8. In effect March 9, 1880.]

Service of summons, in civil action: Sec. 406 et seq.

§ 1168. If the complaint presented establishes, to the satisfaction of the judge or justice, fraud, force, or violence, in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant. [Amendment approved March 9, 1880; Amendments 1880, 9. In effect March 9, 1880.]

Arrest, generally: Sec. 478 et seq.

§ 1169. If, at the time appointed, the defendant do not appear and defend, the court must enter his default, and render judgment in favor of the plaintiff, as prayed for in the complaint.

Judgment by default, generally: Sec. 585.

§ 1170. On or before the day fixed for his appearance, the defendant may appear and answer or demur.

See sec. 1177.

Appearance, generally: Sec. 1014.

Answer—Scope of: Sec. 1172; verification: Sec. 1175; generally: Sec. 437.

§ 1171. Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending. [Amendment approved March 9, 1880; Amendments, 1880, 9. In effect March 9, 1880.]

Trial by jury: Secs. 600-628; issue of fact: Sec. 590 et seq.; waiver: Sec. 631. Formation of the jury: Secs. 600-604.

Justices' courts—trials in: Secs. 878-887.

§ 1172. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the

forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense, that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings.

Amendments: Secs. 472, 473.
Practice, etc.: Secs. 307-1059; see sec. 1177.

§ 1173. When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry, or a forcible or unlawful detainer, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs; such amendment must be made without any imposition of terms. No continuance shall be permitted upon account of such amendment, unless the defendant, by affidavit filed, shows to the satisfaction of the court good cause therefor. [Amendment approved March 12, 1885; Stats. 1885, 102.]

Continuance, generally: Sec. 595.

§ 1174. If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for an unlawful detainer after neglect, or failure to perform the conditions or

covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement. The jury, or the court, if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent; and the judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for three times the amount of the damages thus assessed, and of the rent found due. When the proceeding is for an unlawful detainer after default in the payment of the rent, and the lease or agreement under which the rent is payable has not by its terms expired execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or and subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceeding, and thereupon the judgment shall be satisfied and the tenant be restored to his estate; but if payment, as here provided, be not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately. [Amendment approved March 24, 1874; Amendments 1873-4, 349. In effect July 1, 1874.]

See secs. 1159-1161, generally.

Forfeiture, relief from: Sec. 1179.
Damages, trebling: Sec. 735.

§ 1175. The complaint and answer must be verified.

Verification of pleadings: Sec. 446.

§ 1176. An appeal taken by the defendant shall not stay proceedings upon the judgment, unless the judge or justice before whom the same was rendered so directs. [Amendment approved March 9, 1880; Amendments 1880, 9. In effect March 9, 1880.]

Appeal as stay—generally: Secs. 946, 949.

§ 1177. Except as otherwise provided in this chapter, the provisions of part two, of this Code, are applicable to, and constitute the rules of practice in the proceedings mentioned in this chapter.

For part 2, see ante, sec. 307.

§ 1178. Provisions of part two of this Code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

See ante, secs. 656, 936.

§ 1179. The court may relieve a tenant against a forfeiture of a lease, and restore him to his former estate, in case of hardship, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the court, as provided in section one thousand one hundred and seventy-four. The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the continuance of the term. It must be made

upon petition, setting forth the facts upon which the relief is sought, and be verified by the applicant. Notice of the application, with a copy of the petition, must be served on the plaintiff in the judgment, who may appear and contest the application. In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as the same is practicable, be made. [Amendment approved March 9, 1880; Amendments 1880, 9. In effect March 9, 1880.]

TITLE IV.

OF THE ENFORCEMENT OF LIENS.

Chapter I. Liens in general.
II. Liens of mechanics and others upon real property.
III. Certain liens for salaries and wages.

CHAPTER I.

LIENS IN GENERAL.

§ 1180. Definition of lien.

§ 1180. A lien is a charge imposed upon specific property by which it is made security for the performance of an act.

Lien, definition of—Civil Code, sec. 2872.
Priority of liens—Civil Code, sec. 2897.

CHAPTER II.

LIENS OF MECHANICS AND OTHERS UPON REAL PROPERTY.

§ 1183. What laborers, contractors, etc., may have liens upon.
§ 1184. Liens for grading and filling lots and streets.
§ 1185. What interest in the land subject to the lien.
§ 1186. Effect of liens.
§ 1187. Claim of lien to be filed in recorder's office.
§ 1188. Lien upon two or more pieces of property. Amount due from each to be designated.
§ 1189. Claim to be recorded. Fees of recorder.
§ 1190. Time of continuance of lien.
§ 1191. Service of summons by publication.
§ 1192. Subcontractors, who are, and when paid out of proceeds of sale.
§ 1193. Costs.
§ 1194. Court to declare rank of liens.
§ 1195. Execution for deficit.
§ 1196. Actions for separate liens may be joined, when and how.
§ 1197. Lien does not impair right to proceed for recovery of the debt.
§ 1198. Rules of practice.
§ 1199. New trials and appeals.
§ 1200. Failure or abandonment.
§ 1201. Waiver of claims.
§ 1202. False claims.
§ 1203. Bond of contractor to be filed.

§ 1183. Mechanics, material men, contractors, subcontractors, artisans, architects, machinists, builders, miners, and all persons and laborers of every class, performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, tunnel, fence, machinery, railroad, wagon road, or other structure, shall have a lien upon the property upon which they have bestowed labor, or furnished materials, for the value of such labor done and materials furnished, whether

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at the instance of the owner or of any other person acting by his authority, or under him, as contractor or otherwise; and any person who performs labor in any mining claim or claims, has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, for the work or labor done, or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or of the construction, alteration, addition to, or repair, either in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner, for purposes of this chapter. In case of a contract for the work, between the reputed owner and his contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons, except the contractor, to the extent of the whole contract price; and after all such liens are satisfied then, as a lien for any balance of the contract price in favor of the contractor. All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto, and the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed in the office of the County Recorder of the county or city and

county, where the property is situated, who shall receive one dollar for such filing; otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof. [Amendment approved March 15, 1887; Stats. 1887, 152. In effect March 15, 1887.]

Mechanic's lien, generally: See secs. 1193-1196.
Labor, etc.: Sec. 1184.

§ 1184. No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work; provided, that at least twenty-five per cent of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract. No payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing, or discharging any lien in favor of any person, except the contractor, but as to such liens, such payment shall be deemed as if not made, and shall be applicable to such liens, notwithstanding that the contractor to whom it was paid may thereafter abandon his contract, or be or become indebted to the reputed owner in any amount for damages or otherwise, for nonperformance of his contract or otherwise. As to all liens, except that of the contractor, the

whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim, in favor of the reputed owner and against the contractor; no alteration of any such contract shall affect any lien acquired under the provisions of this chapter. In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof. Any of the persons mentioned in section eleven hundred and eighty-three, except the contractor, may at any time give to the reputed owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. Such notice may be given by delivering the same to the reputed owner personally, or by leaving it at his residence or place of business, with some person in charge, or by delivering it to his architects, or by leaving it at their residence or place of business, with some person in charge, or by posting it in a conspicuous place upon the mining claim or improvement. No such notice shall be invalid by reason of any defect of form, provided it is sufficient to inform the reputed owner of the substantial matters herein provided for, or to put him

upon inquiry as to such matters. Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may become due to such contractor, or other person, to answer such claim and any lien that may be filed therefor for record under this chapter, including counsel fees not exceeding one hundred dollars in each case, besides reasonable costs provided for in this chapter. [Amendment approved March 15, 1887; Stats. 1887, 152. In effect March 15, 1887.]

§ 1185. The land upon which any building, improvement, or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment is also subject to the lien, if at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement, or structure to be constructed, altered, or repaired; but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien. [Amendment approved March 24, 1874; Amendments 1873-4, 351. In effect July 1, 1874.]

§ 1186. The liens provided for in this chapter are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or mate-

rials were commenced to be furnished; also, to any lien, mortgage or other incumbrance of which the lien holder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished.

Parties to suit: Sec. 1190.

§ 1187. The owner of any property on which labor has been performed, or for which materials have been furnished to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any work, mentioned in section eleven hundred and eighty-three of this Code must, within ten days after the completion thereof, or within forty days after cessation from labor upon any unfinished contract, or upon any unfinished building, improvement, or structure, or the alteration, addition to, or the repair thereof, file for record in the office of the County Recorder of the county, or city and county, in which such property or some part thereof is situated, a notice setting forth the date when such building, improvement, or structure, or the alteration, addition to, or repair thereof, was actually completed, or in case of cessation from labor for thirty days, the date on which such cessation actually occurred, and said notice shall also contain the name and the nature of the title of the person who caused the said building, improvement, or structure to be erected, or said alteration, addition to, or repair to be made, and also a description of the property sufficient for identification, and said notice must be verified by said owner or some other person in his behalf. In case any such owner neglect to file said notice as herein required, within the time herein required, then the said owner and all persons deraigning title from him, and all per-

sons claiming an interest in said property, shall be estopped in any proceedings brought to foreclose any mechanics' lien or liens, provided for in this chapter, from maintaining a defense therein based on the ground that said lien or liens have not been filed within the time provided in this chapter. Said notice, when so filed for record must be recorded by the County Recorder with whom the same is filed for record, and the fee for recording the same shall be the sum of one dollar.

Every original contractor, at any time after the completion of his contract, and until the expiration of sixty days after the filing of said notice of completion or notice or cessation of labor by the owner, and every person save the original contractor claiming the benefit of this chapter at any time after the completion of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, and until the expiration of thirty days after the filing of said notice of completion or cessation by said owner, or within thirty days after the performance of any labor in a mining claim, must file for record with the County Recorder of the county, or city and county, in which such property or some part thereof is situated, a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person; provided, however, that in any event all claims of lien must be filed within

ninety days after the completion of said building, improvement, or structure, or the alteration, addition to, or repair thereof. Any trivial imperfection in the said work, or in the construction of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien; and in all cases the occupation or use of a building, improvement, or structure, by the owner, or his representative, or the acceptance by said owner or his agent of said building, improvement, or structure, and cessation from labor for thirty days upon any contract or upon any building, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof for all the purposes of this chapter. [Amendment approved March 27, 1897; Stats. 1897, 1187.]

This section was also amended in 1887; Stats. 1887, p. 152.

Verification of claim: Sec. 446.

§ 1188. In every case in which one claim is filed against two or more buildings, mining claims or other improvements owned by the same person, the person filing such claim must, at the same time, designate the amount due to him on each of such buildings, mining claims, or other improvements, otherwise the lien of such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens by judgment, mortgage, or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated.

§ 1189. The recorder must record the claim in a book kept by him for that purpose, which rec-

ord must be indexed as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds and other instruments.

§ 1190. No lien provided for in this chapter binds any building, mining claim, improvement, or structure, for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same, or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than two years from the time the work is completed, by any agreement to give credit.

Complaint, generally: Sec. 1198.

Court proceedings commenced—personal action: Sec. 1197; intervention: Sec. 387.

Answer: Sec. 1198.

§ 1191. Any person who, at the request of the reputed owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves, the same, or the street or sidewalk in front of or adjoining the same, or constructs any areas, or vaults, or cellars, or rooms, under said sidewalk, or makes any improvements in connection therewith, has a lien upon such lot for his work done and materials furnished. [Amendment approved March 15, 1887; Stats. 1887, 152. In effect March 15, 1887.]

§ 1192. Every building or other improvement mentioned in section one thousand one hundred and eighty-three of this Code, constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest there-

in, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, or the intended construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon. [Amendment approved March 30, 1874; Amendments 1873-4, 410. In effect May 29, 1874.]

§ **1193.** The contractor shall be entitled to recover upon a lien filed by him only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished, as aforesaid; and in all cases where a lien shall be filed, under this chapter, for work, done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which lien is filed; and in case of judgment against the owner or his property, upon the lien, the said owner shall be entitled to deduct from any amount due or to become due by him to the contractor, the amount of such judgment and costs, and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any

amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable. [Amendment approved March 30, 1874; Amendments 1873-4, 411. In effect May 29, 1874.]

§ 1194. In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien, or class of liens, which shall be in the following order, viz: 1. All persons performing manual labor in, on, or about the same; 2. Persons furnishing materials; 3. Subcontractors; 4. Original contractors. And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; and whenever, in the sale of the property subject to the lien, there is a deficiency of proceeds, judgment may be docketed for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages. [Amendment approved March 18, 1885; Stats. 1885, 145.]

Judgment, generally: Sec. 664, and see sec. 1192, ante.

§ 1195. Any number of persons claiming liens may join in the same action, and when separate actions are commenced, the court may consolidate them. The court must also allow, as a part of the costs, the money paid for filing and recording the lien, and reasonable attorneys' fees in the Superior and Supreme Courts, such costs, and attorneys' fees to be allowed to each lien claimant whose lien is established, whether he be plaintiff or defendant, or whether they all join in one action, or separate actions are consolidated. [Amendment approved March 18, 1885; Stats. 1885, 146.]

Consolidation of actions—generally: Sec. 1048.

§ 1196. Whenever materials shall have been furnished for use in the construction, alteration or repair, of any building or other improvement, such materials shall not be subject to attachment, execution, or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such building, mining claim, or other improvement. [Amendment approved March 30, 1874; Amendments 1873-4. 412. In effect May 29, 1874.]

§ 1197. Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover such debt against the person liable therefor. [Amendment approved March 24, 1874; Amendments 1873-4, 351. In effect July 1, 1874.]

§ 1198. Except as otherwise provided in this chapter, the provisions of part two of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter.

See ante, sec. 307 et seq.

§ 1199. The provisions of part two of this Code relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

See ante, secs. 656 et seq, and secs. 936 et seq.

§ 1200. In case the contractor shall fail to perform his contract in full, or shall abandon the

same before completion, the portion of the contract price applicable to the liens of other persons than the contractor shall be fixed as follows: from the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections one thousand one hundred and eighty-three and one thousand one hundred and eighty-four, and the remainder shall be deemed the portion of the contract price applicable to such liens. [New section approved March 18, 1885; Stats. 1885, 146.]

§ 1201. It shall not be competent for the owner and contractor, or either of them, by any term of their contract, or otherwise, to waive, affect, or impair the claims and liens of other persons, whether with or without notice, except by their written consent, and any term of the contract to that effect shall be null and void. [New section approved March 18, 1885; Stats. 1885, 146.]

§ 1202. Any person who shall willfully give a false notice of his claim to the owner, under the provisions of section one thousand one hundred and eighty-four, shall forfeit his lien. Any person who shall willfully include in his claim, filed under section one thousand one hundred and eighty-seven, work or materials not performed upon or furnished for the property described in the claim shall forfeit his lien. If the owner and his contractor shall directly or indirectly conspire to or agree that the written contract filed shall ap-

pear to show the contract price to be less than it really is, and it shall accordingly so show, then such contract shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner and they shall have a lien for the value thereof. [New section approved March 18, 1885; Stats. 1885, 146.]

§ 1203. Every contract required to be filed under the provisions of this chapter shall be accompanied by a good and sufficient bond in an amount equal to at least twenty-five per cent of the contract price, which said bond shall be filed at the same time and in the same manner as herein provided for the filing of such contract or memorandum thereof. Said bond shall, by its terms, be made to inure to the benefit of any and all persons who perform labor for or furnish materials to the contractor or any person acting for him or by his authority; and any such person shall have an action to recover upon said bond, against the principal and sureties, or either of them, for the value of such labor or materials, or both, not exceeding the amount of the bond; but such action shall not affect his lien nor any action to foreclose the same, except that there shall be but one satisfaction of his claim, with costs and counsel fees. Any failure to comply with the provision of this section shall render the owner and contractor jointly and severally liable in damages to any and all materialmen, laborers, and subcontractors entitled to liens upon the property affected by said contract. [New section added March 23, 1893; Stats. 1893, 202.]

CHAPTER III.

CERTAIN LIENS FOR SALARIES AND WAGES.

§ 1204. Preferred creditors when assignment of property is made.
§ 1205. Same, against estates.
§ 1206. Same, in cases of execution or attachment.
§ 1207. Dispute of claim or portion thereof—costs.

§ 1204. In all assignments of property made by any person to trustees or assignees, on account of the inability of the person, at the time of the assignment, to pay his debts, or in proceedings in insolvency, the wages and salaries of the miners, mechanics, salesmen, servants, clerks, laborers employed by such person or any other person, who renders services or performs work to the amount of one hundred dollars each, and for services rendered within sixty days previously, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of the assignor. [Amendment approved March 9, 1893; Stats. 1893, 97.]

Assignments for benefit of creditors—Civil Code, secs. 3449, 3473.

Proceedings in insolvency: See sec. 1822.

§ 1205. In case of the death of any employer, the wages of each miner, mechanic, salesman, clerk, servant, laborer, or any other person who renders services, or performs work for services rendered within the sixty days next preceding the death of the employer, not exceeding one hundred dollars, rank in priority next after the funeral expenses, expenses of the last sickness, the charges and expenses of administering upon the estate, and the allowance to the widow and infant children and must be paid before other claims

against the estate of the deceased person. [Amendment approved March 9, 1893; Stats. 1893, 97.]

Estate of deceased persons, payment of debts, generally: Sec. 1643 et seq.

§ 1206. In cases of executions, attachments, and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks and laborers, or any other person who renders services or performs work, who have claims against the defendant for labor done or work performed, may give notice of their claims, and the amount thereof, sworn to by the person making the claim, to the creditor and the officer executing either of such writs, at any time before the actual sale of property levied on, or, in the event of a levy upon money, at any time before the transfer of such money under execution and, unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, or in the event of a levy on money, out of such money, the amount each is entitled to receive for services rendered within the sixty days next preceding the levy of the writ, not exceeding one hundred dollars. If any or all of the claims so presented and claiming preference under this section are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days for the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim or priority of payment thereof; and the officer shall retain possession of so much of the proceeds of the sale or money as may be necessary to satisfy such claim until the determination of such action; and in case judg-

ment be had for the claim, or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim with the same rank as the original claim. [Amendment approved March 9, 1893; Stats. 1893, 87.]

§ 1207. The debtor or creditor intending to dispute a claim presented under the provisions of the last section shall, within ten days after receiving notice of such claim, serve upon the claimant and the officer executing the writ a statement in writing, verified by the oath of the debtor or the person disputing such claim, setting forth that no part of said claim, or not exceeding a sum specified, is justly due from the debtor to the claimant for services rendered within the sixty days next preceding the levy of the writ. If the claimant bring suit on a claim which is disputed in part only and fail to recover a sum exceeding that which was admitted to be due, he shall not recover costs, but costs shall be adjudged against him. [New section approved March 7, 1883; Stats. 1883, 47. In effect March 7, 1883.]

TITLE V.

OF CONTEMPTS.

§ 1209. What acts or omissions are contempts.
§ 1210. Re-entry on property after eviction, when a contempt.
§ 1211. A contempt committed in the presence of the court may be punished summarily. When not so committed, an affidavit or statement shall be made.
§ 1212. A warrant of attachment may issue or a notice to show cause.
§ 1213. Bail may be given by a person arrested under such warrant.
§ 1214. Sheriff must, upon executing the warrant, arrest and detain the person until discharged.
§ 1215. Bail bond, form and conditions of.
§ 1216. Officer must return warrant and undertaking, if any.
§ 1217. Hearing.
§ 1218. Judgment and penalty, if guilty.
§ 1219. If the contempt is the omission to perform any act, the person may be imprisoned until performance.
§ 1220. If a party fail to appear, proceedings.
§ 1221. Illness sufficient cause for non-appearance of party arrested. Confinement under arrests for contempt.
§ 1222. Judgment and orders in such cases final.

§ 1209. The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

2. A breach of the peace, boisterous conduct,

or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding;

3. Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service;

4. Deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding;

5. Disobedience of any lawful judgment, order or process of the court;

6. Assuming to be an officer, attorney, counsel of a court, and acting as such, without authority;

7. Rescuing any person or property, in the custody of an officer, by virtue of an order or process of such court;

8. Unlawfully detaining a witness, or party to an action, while going to, remaining at, or returning from the court where the action is on the calendar for trial;

9. Any other unlawful interference with the process or proceedings of a court;

10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness;

11. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action, to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

12. Disobedience by an inferior tribunal, magis-

trate, or officer, of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer. But no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court, unless made in the immediate presence of such court while in session, and in such a manner as to actually interfere with its proceedings. [Amendment approved February 17, 1891; Stats. 1891, 6. In effect immediately.]

Powers of courts: Secs. 128, 177, 178.

Juror willfully failing to attend: Sec. 238.

Dispossession of party placed in possession under process: Sec. 1210.

Contempt, powers of courts: Secs. 128, 177, 178; in justices' courts: Secs. 906-910.

Misbehavior of attorney: Sec. 287 et seq.

Disobedience of lawful judgment or order—by executor: Sec. 1440.

§ 1210. Every person dispossessed or ejected from or out of any real property by the judgment or process of any court of competent jurisdiction, and who, not having right so to do, re-enters into or upon or takes possession of any such real property, or induces or procures any person not having right so to do, or aids or abets him therein, is guilty of a contempt of the court by which such judgment was rendered or from which such process issued. Upon a conviction for such contempt

the court must immediately issue an alias process, directed to the proper officer, and requiring him to restore such possession to the party entitled under the original judgment or process (or to his lessor or to his grantor), and no appeal from the order directing the issuance of an alias writ of possession shall stay the execution thereof, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that he will not commit or suffer to be committed any waste therein, and if the order be affirmed or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of his unlawful re-entry until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the order for the alias writ was made, and which must be specified in the undertaking. [Amendment approved March 23, 1893; Stats. 1893, 281. In effect immediately.]

§ 1211. When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge, of the facts constituting the contempt or a statement of the facts by the referees or arbitrators, or other judicial officer.

Contempt away from court, attachment: Sec. 1212 et seq.

§ 1212. When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may upon notice or upon an order to show cause be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause.

§ 1213. Whenever a warrant of attachment is issued, pursuant to this title, the court or judge must direct, by an indorsement on such warrant, that the person charged may be let to bail for his appearance in an amount to be specified in such indorsement.

§ 1214. Upon executing the warrant of attachment, the Sheriff must keep the person in custody, bring him before the court or judge, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next section.

§ 1215. When a direction to let the person arrested to bail is contained in the warrant of attachment, or indorsed thereon, he must be discharged from the arrest upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant and abide the order of the court or judge

thereupon; or they will pay, as may be directed, the sum specified in the warrant.

§ 1216. The officer must return the warrant of arrest and undertaking, if any, received by him from the person arrested, by the return day specified therein.

§ 1217. When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary.

§ 1218. Upon the answer and evidence taken the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both.

§ 1219. When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act must be specified in the warrant of commitment.

Executor or administrator, contempt: Sec. 1440.

§ 1220. When the warrant of arrest has been returned served, if the person arrested do not appear on the return day, the court or judge may issue another warrant of arrest, or may order the undertaking to be prosecuted or both. If the undertaking be prosecuted, the measure of damages in the action is the extent of the loss or in-

jury sustained by the aggrieved party, by reason of the misconduct for which the warrant was issued, and the costs of the proceeding.

§ 1221. Whenever, by the provisions of this title, an officer is required to keep a person arrested on a warrant of attachment in custody, and to bring him before a court or judge, the inability, from illness or otherwise, of the person to attend is sufficient excuse for not bringing him up; and the officer must not confine a person arrested upon the warrant in a prison, or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

§ 1222. The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive.

TITLE VI.

OF THE VOLUNTARY DISSOLUTION OF CORPORATIONS.

§ 1227. How dissolved.
§ 1228. Application, what to contain.
§ 1229. Application, how signed and verified.
§ 1230. Filing application and publication of notice.
§ 1231. Objections may be filed.
§ 1232. Hearing of application.
§ 1233. Judgment roll and appeals.

§ 1227. A corporation may be dissolved by the Superior Court of the county where its principal place of business is situated, upon its voluntary application for that purpose. [Amendment approved March 16, 1880; Amendments 1880, 109. In effect April 16, 1880.]

Stats. 1850, p. 350, sec. 31.

Voluntary dissolution, receiver: Sec. 565.

Involuntary dissolution: Sec. 802 et seq.

§ 1228. The application must be in writing, and must set forth:

1. That at a meeting of the stockholders or members called for that purpose, the dissolution of the corporation was resolved upon by a two-third vote of all the stockholders or members;

2. That all claims and demands against the corporation have been satisfied and discharged.

§ 1229. The application must be signed by a majority of the board of trustees, directors, or other officers having the management of the affairs of the corporation, and must be verified in the same manner as a complaint in a civil action.

Verification: Sec. 446.

§ 1230. If the court is satisfied that the application is in conformity with this title, the judge thereof must order it to be filed with the clerk, and that the clerk give not less than thirty nor more than fifty days' notice of the application, by publication in some newspaper published in the county; and if there are none such, then by advertisements posted up in three of the principal public places in the county. [Amendment approved April 16, 1880; Amendments 1880, 109. In effect April 16, 1880.]

§ 1231. At any time before the expiration of the time of publication, any person may file his objections to the application.

§ 1232. After the time of publication has expired, the court may, upon five days' notice to the persons who have filed objections or without further notice, if no objections have been filed, proceed to hear and determine the application, and if all the statements therein made are shown to be true, must declare the corporation dissolved.

[Amendment approved February 25, 1878; Amendments 1877-8, 108. In effect February 25, 1878.]

Notices, service, etc: Sec. 1010 et seq.

§ 1233. The application, notices, and proof of publication, objections (if there be any) and declaration of dissolution, constitute the judgment roll; and from the judgment an appeal may be taken, as from other judgments of the Superior Courts. [Amendment approved April 16, 1880; Amendments 1880, 109. In effect April 16, 1880.]

Appeals to Supreme Court: Secs. 963-966.

§ 1234. If the applicant be a savings and loan association, or engaged in the business of receiving money on deposit, and there be any unclaimed deposit or dividend in its hands belonging to a person whose whereabouts are unknown to the trustees, directors, or other officers presenting the application, the application shall set forth the name of the person making such deposit or entitled to such dividend, the time when such deposit was made or dividend declared, the residence, if known, of such person at the time of such deposit, the amount of such deposit or dividend, and the fact that the whereabouts of such person are known. The same facts shall be stated in the notice of the application given by the clerk. If, at any time before the expiration of the time of publication, any person shall file a claim to such deposit or dividend, the court shall, at the hearing and upon five days' notice to him, hear and determine his claim, and, if such claim be established, order such money to be paid to him. All such deposits or dividends not so claimed, or as to which no claim shall be established, shall, upon order of the court, be paid into the state treasury, accompanied with a copy of the order, which shall set

forth the facts hereinbefore required to be stated concerning such deposits or dividends; and, upon production of the Treasurer's receipt for such payment, the court may proceed to declare the corporation dissolved as in other cases. All unclaimed deposits and dividends so paid into the state treasury shall be received, invested, accounted for, and paid out, in the same manner and by the same officers as is provided by law in the case of escheated estates and in section twelve hundred and seventy-two of this Code. [New section approved February 25, 1897; Stats. 1897, c. 35.]

TITLE VII.

OF EMINENT DOMAIN.

§ 1237. Eminent domain defined.
§ 1238. Purposes for which it may be exercised.
§ 1239. What estates in land may be acquired by condemnation.
§ 1240. Private property defined. Classes enumerated.
§ 1241. Facts necessary to be found before condemnation.
§ 1242. Parties may make location. May enter to make surveys.
§ 1243. Jurisdiction in District Court.
§ 1244. The complaint and its contents.
§ 1245. Summons, what to contain. How issued and served.
§ 1246. Who may defend. What the answer may show, and how verified.
§ 1247. Court shall have jurisdiction to regulate the mode of making crossings or of enjoying a common use.
§ 1248. Court or jury to assess damages.
§ 1249. The date with respect to which compensation shall be assessed, and the measure thereof.
§ 1250. New proceedings to cure defective title.
§ 1251. Payment of damages.
§ 1252. Damages, to whom paid.
§ 1253. Final order of condemnation, what to contain. When filed, title vests.
§ 1254. Putting plaintiff in possession.
§ 1255. Costs may be allowed, distribution thereof.
§ 1256. Rules of practice.
§ 1257. New trials and appeals.
§ 1258. When title takes effect, and construction of.
§ 1259. When title takes effect.
§ 1260. Construction.
§ 1261. Pending proceedings not affected.
§ 1262. Rules of practice.
§ 1263. Exceptions.

§ 1237. Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title.

Constitutional provisions: See Const. Cal., art. 1, sec. 14; art. 12, sec. 8; art. 15, sec. 1.

§ 1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Fortifications, magazines, arsenals, navy yards, navy and army stations, lighthouses, range and beacon lights, coast surveys, and all other public uses authorized by the government of the United States.

2. Public buildings and grounds for the use of the State, and all other public uses authorized by the Legislature of this State.

3. Public buildings and grounds for the use of any county, incorporated city, or city and county, village, town, or school districts; canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes for conducting or storing water for the use of the inhabitants of any county, incorporated city, or city and county, village, or town, or for draining any county, incorporated city, or city and county, village, or town; raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels, roads, streets, and alleys, and all other public uses for the benefit of any county, incorporated city, or city and county, village, or town, or the inhabitants thereof, which may be authorized by the Legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads; paths and roads either on the surface, elevated, or depressed, for the use of bicycles, tricycles, motor-cycles, and other horseless vehicles; steam, electric, and horse railroads, canals, ditches, dams, pondings, flumes, aqueducts, and pipes for irrigation, public transportation, supply-

ing mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.

5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.

6. By-roads leading from highways to residences, farms, mines, mills, factories, and buildings for operating machinery, or necessary to reach any property used for public purposes.

7. Telegraph lines.

8. Sewerage of any incorporated city, or city and county, or of any village, or town, whether incorporated or unincorporated, or of any settlement consisting of not less than ten families, or of any public buildings belonging to the State, or to any college or university.

9. Roads for transportation by traction engines or road locomotives.

10. Oil pipe-lines.

11. Roads for logging or lumbering purposes.

12. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes, for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for the supplying of mines, quarries, railroads, tramways, mills, and factories with electrical power, and also for the supplying electricity to light or heat mines, quarries, mills, factories, incorporated cities, cities and counties, villages, or towns, together with lands, buildings, and all other improvements in or upon which to erect, install, place, use, or operate machinery for the purpose

of generating and transmitting electricity for any of the purposes or uses above set forth.

13. Electric light lines. [Amendment approved March 4, 1897: Stats. 1897, c. 77. In effect immediately.]

This section was also amended in 1891: Stats. 1891, p. 48; and in 1893: Stats. 1893, p. 146; and in 1895: Stats. 1895, p. 89.

Eminent domain generally: See Civ. Code, sec. 1001.

§ 1239. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine;

2. An easement, when taken for any other use;

3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use. [Amendment approved March 24, 1874; Amendments 1873-4, p. 355. In effect July 1, 1874.]

§ 1240. The private property which may be taken under this title, includes:

1. All real property belonging to any person;

2. Lands belonging to this State, or to any county, incorporated city, or city and county, village, or town, not appropriated to some public use;

3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated;

4. Franchises for toll roads, toll bridges, and ferries, and all other franchises; but such franchises shall not be taken unless for free highways, railroads, or other more necessary public use;

5. All rights of way for any and all the purposes mentioned in section twelve hundred and thirty-eight, and any and all structures and improvements thereon, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by any other right of way or improvements, or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury;

6. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

More necessary public use: See sec. 1241, subd. 3.
Crossings: See sec. 1247, subd. 1.

§ 1241. Before property can be taken, it must appear:

1. That the use to which it is to be applied is a use authorized by law;

2. That the taking is necessary to such use;

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

§ 1242. In all cases where land is required for public use, the State, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provi-

sions of section twelve hundred and forty-seven. The State, or its agents in charge of such public use, may enter upon the land and make examination, surveys and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except for injuries resulting from negligence, wantonness, or malice.

State or its agents: Civ. Code, sec. 1001.

§ **1243.** All proceedings under this title must be brought in the Superior Court of the county in which the property is situated. They must be commenced by filing a complaint and issuing a summons thereon. [Amendment approved April 26, 1880; Amendments 1880, p. 118. In effect April 26, 1880.]

Complaint: Sec. 1244; generally, sec. 426.
Summons: Sec. 1245; generally, sec. 406 et seq.

§ **1244.** The complaint must contain:

1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff;

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants;

3. A statement of the right of the plaintiff;

4. If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding;

5. A description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract. All parcels lying in the county, and required for the same public use, may be included in the same

or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties.

When application for the condemnation of a right of way for the purposes of sewerage is made on behalf of a settlement, or of an incorporated village or town, the board of supervisors of the county may be named as plaintiff. [Amendment approved April 26, 1880; Amendments 1880, p. 118. In effect April 26, 1880.]

§ 1245. The clerk must issue a summons, which must contain the names of the parties, a general description of the whole property, a statement of the public use for which it is sought, and a reference to the complaint for descriptions of the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner.

Summons generally, contents: Sec. 407 et seq.; service: Sec. 410 et seq.

§ 1246. All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

Appearance, generally: Sec. 1014.

Answer, counter-claim, and cross-complaint: Secs. 437-442.

§ 1247. The court shall have power:

1. To regulate and determine the place and

manner of making connections and crossings, or of enjoying the common use mentioned in the fifth subdivision of section twelve hundred and forty;

2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor;

3. To determine the respective rights of different parties seeking condemnation of the same property.

§ 1248. The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed under subdivision two, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages, so assess-

ed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value;

4. If the property sought to be condemned be water or the use of water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property;

5. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle guards where fences may cross the line of such railroad;

6. As far as practicable, compensation must be assessed for each source of damages separately. [Amendment approved March 19, 1889; Stats. 1889, p. 343. In effect March 19, 1889.]

Judgment of condemnation: See sec. 1253.
Practice, etc: Secs. 1256, 1257.
Conflict of plaintiffs: See sec. 1246.
Jury: See sec. 1256, infra.
Value, etc: Sec. 1249.

§ 1249. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to

property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in section twelve hundred and forty-eight. If an order be made letting the plaintiff into possession, as provided in section twelve hundred and fifty-four, the compensation and damages awarded shall draw lawful interest from the date of such order. No improvements put upon the property, subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

§ 1250. If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this title prescribed.

§ 1251. The plaintiff must, within thirty days after final judgment, pay the sum of money assessed; but may, at the time of or before payment, elect to build the fences and cattle guards, and if he so elect, shall execute to the defendant a bond, with sureties to be approved by the court in double the assessed cost of the same, to build such fences and cattle guards within eighteen months from the time the railroad is built on the land taken, and if such bond be given, need not pay the cost of such fences and cattle guards. In an action on such bond, the plaintiff may recover reasonable attorney's fees.

§ 1252. Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases, and if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the en-

tire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

Payment, when to be made: Secs. 1251, 1254.

§ **1253.** When payments have been made, and the bond given, if the plaintiff elects to give one, as required by the last two sections, the court must make a final order of condemnation, which must describe the property condemned, and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified.

§ **1254.** At any time after the filing of the complaint, and the issuance and service of the summons thereon, the court may, upon notice to the defendant by said court, by an order in that behalf made, authorize the plaintiff, if already in possession, to continue in the possession and use, and if not in possession, to take possession of and use the land and premises sought to be condemned, during the pendency and until the final conclusion of the proceedings brought to condemn the same, and may stay all actions and proceedings against such plaintiff on account thereof; provided, however, that in and by said order said plaintiff shall be ordered to pay, and thereafter and before the taking of such possession, or of the further continuance in possession of any such land and premises, pay a sufficient sum of money into court, or give security for the payment thereof, to be approved by the judge of such court, to compensate said defendant for all damages which may be sustained by said defendant by reason of such proceedings, or of any such condemnation;

provided, the condemnation shall be finally had of the said land and premises, together with all damages which may be sustained by the said defendant, if the said proceedings for said condemnation shall finally fail; or if for any cause the said land and premises shall not be taken for the public use for which the same is sought to be condemned, and upon the deposit of the said money, or upon the giving of such security, as ordered by the court, the said plaintiff, by the said order of the said court, shall be let into the possession and use of said land and premises sought to be condemned, or be continued in the possession and use thereof, in the same manner and to the same effect as the said plaintiff would be entitled after the trial of such proceedings and the entry of final judgment therein, except that the right of said plaintiff to retain such possession and to use said land and premises shall be determined by said final judgment, and in case of a refusal of the defendant, upon the order of said court, to allow the said plaintiff to enter into the possession and use of said land and premises, or any part thereof, the said court, upon application of said plaintiff, shall issue a writ of assistance of the same force and effect as writs of assistance are issued in other cases in which writs of assistance are issuable, which said writ shall be executed by the Sheriff of the county wherein the said land and premises may be situated, without delay.

The defendant who is entitled to the said money paid into court as aforesaid, or upon any judgment in such proceedings, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court, upon application being made by such defendant, to order and di-

rect that the money so paid into court be delivered to him upon his filing a satisfaction of the judgment, or upon filing his receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation. In ascertaining the amount to be paid into court, the court shall take care that the same be sufficient and adequate. The payment of the money into court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution; but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceedings), at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally settled by judicial determination, and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by order of court to take it. If, for any reason, the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided, and until such time or times the County Clerk shall be deemed to be the custodian of the money, and shall be liable to the plaintiff upon his official bond for the same, or any part thereof, in case it be for any reason lost or otherwise abstracted or withdrawn. The court,

however, may order the money to be deposited in the state treasury, and in such case it shall be the duty of the State Treasurer to receive all such moneys, duly receipt for, and safely keep the same in a special fund, to be entered upon his books as a condemnation fund for such purpose, and for such duty he shall be liable to the plaintiff upon his official bond. The State Treasurer shall pay out such money so deposited in such manner and at such times as the court may, by order, direct. In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him. [Amendment approved March 27, 1897; Stat. 1897, c. 127. In effect immediately.]

Interest: Sec. 1249. It is payable from the commencement of the thirty days mentioned in section 1251.

§ 1255. Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court.

§ 1256. Except as otherwise provided in this title, the provisions of part two of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this title.

Part 2: See ante, secs. 307 et seq.

§ 1257. The provisions of part two of this Code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title; provided, that upon the payment of the sum of money assessed, and upon the

execution of the bond to build the fences and cattle-guards, as provided in section twelve hundred and fifty-one, the plaintiff shall be entitled to enter into, improve, and hold possession of the property sought to be condemned, if not already in possession, or shall have been let into the possession and use thereof, as provided in section twelve hundred and fifty-four, and devote the same to the public use in question; and no motion for a new trial or appeal shall, after such payment and filing of such bond as aforesaid, in any manner retard the contemplated improvement. Any money which shall have been deposited, as provided in section twelve hundred and fifty-four, may be applied to the payment of the money assessed, and the remainder, if any there be, shall be returned to the plaintiff. [Approved March 27, 1897; Stats. 1897, c. 127. In effect immediately.]

§ 1258. With relation to the acts passed at the present session of the Legislature, this title must be construed in the same manner as if this Code had been passed on the last day of this session, and from and after the time this Code takes effect, all laws of this State in relation to the taking of private property for public uses are abolished, and all proceedings had in the exercise of the powers of eminent domain must conform to the provisions of this title.

§ 1259. Title seven of part three of the Code of Civil Procedure of the State of California (this title) shall be in force and effect from and after the fourth day of April, one thousand eight hundred and seventy-two.

Section added by act of April 1, 1872; same applies to remaining sections of this title.

§ 1260. From and after the time this title

takes effect, it must be construed in the same manner as it would be were sections four and seventeen of this Code in force and effect.

§ 1261. No proceeding to enforce the right of eminent domain commenced before this title takes effect is affected by the provisions of this title.

§ 1262. Until the first day of January, one thousand eight hundred and seventy-three, at twelve o'clock noon, the provisions of sections twelve hundred and fifty-six and twelve hundred and fifty-seven of this title are suspended; and until then, except as otherwise provided in this title, the rules of pleading and practice in civil actions now in force in this State are applicable to the proceedings mentioned in this title, and constitute the rules of pleading and practice therein.

§ 1263. Nothing in this Code must be construed to abrogate or repeal any statute providing for the taking of property in any city or town for street purposes.

TITLE VIII.

OF ESCHEATED ESTATES.

§ 1269. Manner of commencing proceedings relative to escheated estates.
§ 1270. Receiver of rents and profits may be appointed.
§ 1271. Appearance, pleadings, and trial.
§ 1272. Proceedings by persons claiming escheated estates.

§ 1269. When the attorney general is informed that any real estate has escheated to this State, he must file an information in behalf of the State in the Superior Court of the county in which such estate, or any part thereof, is situated, setting forth a description of the estate, the name of the

person last seized, the name of the occupant and person claiming such estate, if known, and the facts and circumstances in consequence of which the estate is claimed to have escheated, with an allegation that, by reason thereof, the State of California has right by law to such estate. Upon such information, a summons must issue to such person, requiring him to appear and answer the information within the time allowed by law in civil actions; and the court must make an order setting forth briefly the contents of the information, and requiring all persons interested in the estate to appear and show cause, if any they have, within forty days from the date of the order, why the same should not vest in this State; which order must be published for at least one month from the date thereof, in a newspaper published in the county, if one be published therein, and in case no newspaper is published in the county, in some other newspaper in this State. [Amendment approved April 16, 1880; Amendments 1880, p. 110. In effect April 16, 1880.]

Unclaimed realty of nonresident aliens escheats to State: Civ. Code, sec. 672.

§ 1270. The court, upon the information being filed, and upon the application of the attorney-general, either before or after answer, upon notice to the party claiming such estate if known, may, upon sufficient cause therefor being shown, appoint a receiver to take charge and receive the rents and profits of the same until the title to such real estate is finally settled.

Appoint a receiver: See generally, secs. 564-569.

§ 1271. All persons named in the information may appear and answer, and may traverse or deny the facts stated in the information, the title of the

State to lands and tenements therein mentioned, at any time before the time for answering expires, and any other person claiming an interest in such estate may appear and be made a defendant, and by motion for that purpose in open court within the time allowed for answering; and if no person appears and answers within the time, then judgment must be rendered, that the State be seized of the lands and tenements in such information claimed. But if any person appear and deny the title set up by the State, or traverse any material fact set forth in the information, the issue of fact must be tried as issues of facts are tried in civil actions. If, after the issues are tried, it appears from the facts found or admitted that the State has good title to the land and tenements in the information mentioned, or any part thereof, judgment must be rendered that the State be seized thereof, and recover costs of suit against the defendants. In any judgment rendered, or that has heretofore been rendered by any court of competent jurisdiction, escheating real property to the State, on motion of the attorney-general, the court shall make an order that said real property be sold by the sheriff of the county where the same is situate, at public sale, for gold coin, after giving such notice of the time and place of sale as may be prescribed by the court in the said order; that the sheriff shall, within five days after such sale, make a report thereof to the court, and upon the hearing of said report, the court may examine the said report and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent, exclusive of the expense of a new sale, may be obtained, the court may vacate the sale, and

direct another sale to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. If an offer of ten per cent more in amount than that named in the report be made to the court in writing, by a responsible person, the court may, in its discretion, accept such offer, and confirm the sale to such person, or order a new sale. If it appears to the court that the sale was legally made, and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold, and that a greater sum than ten per cent, exclusive of the expense of a new sale, cannot be obtained, or if the increased bid above mentioned be made and accepted by the court, the court must make an order confirming the sale, and directing the sheriff, in the name of the State, to execute to purchaser or purchasers a conveyance of said property sold; and said conveyance shall vest in the purchaser or purchasers all the right and title of the State therein, and the sheriff shall, out of the proceeds of such sale, pay the cost of said proceedings incurred on behalf of the State, including the expenses of making such sale, and also an attorney's fee, if additional counsel was employed in said proceedings, to be fixed by the court, not exceeding ten per cent on the amount of such sale, and the residue thereof shall be paid by said sheriff into the State treasury. [Amendment approved March 2, 1881; Stats. 1881, p. 11. In effect March 2, 1881.]

Proceedings, appearance: Sec. 1014; answer: Sec. 437; judgment: Secs. 585, 664; trial: Secs. 600-645; issue of fact: Secs. 590, 592; costs: Secs. 1021 et seq.

§ 1272. Within twenty years after judgment in any proceeding had under this title, a person not

a party or privy to such proceeding may file a petition in the Superior Court of the County of Sacramento, showing his claim or right to the property, or the proceeds thereof. A copy of such petition must be served on the attorney general at least twenty days before the hearing of the petition, who must answer the same; and the court thereupon must try the issue as issues are tried in civil actions, and if it be determined that such person is entitled to the property, or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or if it has been sold and the proceeds paid into the State treasury, then it must order the controller to draw his warrant on the treasury for the payment of the same, but without interest or cost to the State, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant. All persons who fail to appear and file their petitions within the time limited are forever barred; saving, however, to infants, married women, and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file their petitions at any time within the time limited, or five years after their respective disabilities cease. [Amendment approved April 16, 1880; Amendments 1880, p. 110. In effect April 16, 1880.]

TITLE IX.

OF CHANGE OF NAMES.

§ 1275. Jurisdiction.
§ 1276. Application for change of name, how made.
§ 1277. Publication of petition for.
§ 1278. Hearing of application and remonstrance.
§ 1279. Return by county clerk.

§ 1275. Applications for change of names must be heard and determined by the Superior Courts. [Amendment approved April 23, 1880; Amendments 1880, p. 117. In effect April 23, 1880.]

§ **1276.** All applications for change of names must be made to the Superior Court of the county where the person whose name is proposed to be changed resides, by petition, signed by such person; and if such person is under twenty-one years of age, if a male, and under the age of eighteen years, if a female, by one of the parents, if living, or if both be dead, then by the guardian; and if there be no guardian, then by some near relative or friend. The petition must specify the place of birth and residence of such person, his or her present name, the name proposed, and the reason for such change of name; and must, if the father of such person be not living, name, as far as known to the petitioner, the near relatives of such person, and their place of residence. Any religious, benevolent, literary, scientific, or other corporation, or any corporation bearing or having for its name, or using or being known by the name of, any benevolent or charitable order or society, may, by petition, apply to the Superior Court of the county in which its articles of incorporation were originally filed, or in which the property of such incorporation is sit-

uated, for a change of its corporate name. Such petition must be signed by a majority of the Directors or Trustees of the corporation, and must specify the date of the formation of the corporation, its present name, the name proposed, and the reason for such change of name. Upon filing such petition on behalf of such corporation, the same proceedings shall be had, as upon applications for changes of names of natural persons, and no banking corporation hereafter organized shall adopt or use the name of any friendly association. [Amendment approved March 12, 1885; Stats. 1885, p. 112. In effect March 12, 1885.]

§ 1277. A copy of such petition must be published for four successive weeks, in some newspaper printed in the county, if a newspaper be printed therein, but if no newspaper be printed in the county, a copy of such petition must be posted at three of the most public places in the county for a like period, and proofs must be made of such publication before the petition can be considered.

§ 1278. Such application must be heard at such time as the court may appoint, and objections may be filed by any person who can, in such objections, show to the court good reason against such change of name. On the hearing, the court may examine on oath any of the petitioners, remonstrants, or other persons, touching the application, and may make an order changing the name, or dismissing the application, as to the court may seem right and proper. [Amendment approved April 23, 1880; Amendments 1880, p. 117. In effect April 23, 1880.]

§ 1279. Each county clerk shall, annually, in the month of January, make a return to the office

of the Secretary of State of all changes of names made in the Superior Court of his county under this title. Such return shall show the date of the decree of the court, original name, name decreed, and residence. Such returns shall be published in a tabular form with the statutes first published thereafter. [Amendment approved April 23, 1880; Amendments 1880, p. 118. In effect April 23, 1880.]

TITLE X.

OF ARBITRATIONS.

§ 1281. What may be submitted to arbitration, and when.
§ 1282. Submission to arbitration to be in writing.
§ 1283. Submission may be entered as an order of the court. Revocation.
§ 1284. Powers of arbitrators.
§ 1285. Majority of arbitrators may determine any question. They must be sworn.
§ 1286. Award to be in writing. When judgment to be entered.
§ 1287. Award may be vacated in certain cases.
§ 1288. Court may, on motion, modify or correct the award.
§ 1289. Decision, on motion, subject to appeal, but not the judgment entered before motion.
§ 1290. If submission be revoked and an action brought, what to be recovered.

§ 1281. Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property.

§ 1282. The submission to arbitration must be in writing, and may be to one or more persons.

§ 1283. It may be stipulated in the submission that it be entered as an order of the Superior Court, for which purpose it must be filed with the clerk of the county where the parties, or one of them, reside. The clerk must thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award must be made. When so entered, the submission cannot be revoked without the consent of both parties. The arbitrators may be compelled by the court to make an award, and the award may be enforced by the court in the same manner as a judgment. If the submission is not made an order of the court, it may be revoked at any time before the award is made. [Amendment approved April 15, 1880; Amendments 1880, p. 74. In effect April 15, 1880.]

Register of actions generally: Sec. 1052.

§ 1284. Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon.

§ 1285. All the arbitrators must meet and act together during the investigation; but when met, a majority may determine any question. Before acting, they must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding.

Majority acting: Sec. 1053.

§ 1286. The award must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the court, the award must be filed with the clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit, showing that notice of filing the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment book, and thereupon has the effect of a judgment.

§ 1287. The court, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion:

1. That it was procured by corruption or fraud;

2. That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced;

3. That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed.

Referee's report: Secs. 643-645.

§ 1288. The court may, on motion, modify or correct the award, where it appears:

1. That there was a miscalculation in figures upon which it was made, or that there is a mis-

take in the description of some person or property therein;

2. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted;

3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

§ 1289. The decision upon the motion is subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before a motion made cannot be subject to appeal.

Motion to vacate or modify award: Secs. 1287, 1288.

Appealable orders: Sec. 939.

§ 1290. If a submission to arbitration be revoked, and an action be brought therefor, the amount to be recovered can only be the costs and damages sustained in preparing for and attending the arbitration.

Appealable orders: Sec. 939.

TITLE XI.

OF PROCEEDINGS IN PROBATE COURT.

Chapter I. Of jurisdiction, §§ 1294-1295.
II. Of the probate of wills, §§ 1298-1346.
III. Of executors and administrators, their letters, bonds, removals, and suspensions, §§ 1349, 1440.
IV. Of the inventory and collection of the effects of decedents, §§ 1443-1461.
V. Of the provisions for support of family, and of the homestead, §§ 1464-1486.
VI. Of claims against the estate, §§ 1490-1513.
VII. Of sales and conveyance of property to decedent, §§ 1516-1576.
VIII. Of the powers and duties of executors and administrators, and of the management of estates, §§ 1581-1591.
IX. Of the conveyance of real estate by executors and administrators in certain cases, §§ 1597-1607.
X. Of accounts rendered by executors and administrators, and of the payment of debts, §§ 1612-1653.
XI. Of the partition, distribution, and final settlement of estates, §§ 1658-1698.
XII. Of orders, decrees, process, minutes, records, and appeals, §§ 1704-1722.
XIII. Of public administrator, §§ 1726-1743.
XIV. Of guardian and ward, §§ 1747-1809.

CHAPTER I.

OF JURISDICTION.

§ 1294. Jurisdiction of Probate Court over the estate, when exercised.
§ 1295. When jurisdiction decided by first application.

§ 1294. Wills must be proved, and letters testamentary or of administration granted:

1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died;

2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the State;

3. In the county in which any part of the estate may be, the decedent having died out of the State, and not resident thereof at the time of his death;

4. In the county in which any part of the estate may be, the decedent not being a resident of the State, and not leaving estate in the county in which he died;

5. In all other cases, in the county where application for letters is first made.

Probate matters, jurisdiction of Superior Courts in: Sec. 76, subd. 4.

§ 1295. When the estate of the decedent is in more than one county, he having died out of the State, and not having been a resident thereof at the time of his death, or being such non-resident, and dying within the State, and not leaving estate in the county where he died, the Superior Court of that county in which application is first made. for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate. [Amendment approved April 16, 1880; Amendments 1880, p. 77. In effect April 16, 1880.]

CHAPTER II.

OF THE PROBATE OF WILLS.

Article I. Petition, Notice, and Proof.
II. Contesting Probate of Will.
III. Probate of Foreign Wills.
IV. Contesting Will after Probate.
V. Probate of Lost or Destroyed Will.
VI. Probate of Nuncupative Wills.

ARTICLE I.

PETITION, NOTICE, AND PROOF.

§ 1298. Custodian of will to deliver same, to whom. Penalty.
§ 1299. Who may petition for probate of will.
§ 1300. Contents of petition.
§ 1301. When executor forfeits right to letters.
§ 1302. Will to accompany petition, or its presentation prayed for and how enforced.
§ 1303. Notice of petition for probate, how given.
§ 1304. Heirs and named executors to be notified, how.
§ 1305. Petition may be presented to judge at chambers, and what judge may do.
§ 1306. Hearing proof of will after proof of service of notice.
§ 1307. Who may appear and contest the will.
§ 1308. Probate, when no contest.
§ 1309. Olographic wills.

§ 1298. Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the Superior Court having jurisdiction of the estate, or to the executor named therein. A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by any one injured thereby. [Amendment approved April 16, 1880; Amendments 1880, p. 77. In effect April 16, 1880.]

§ 1299. Any executor, devisee, or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the State, or a nuncupative will.

§ 1300. A petition for the probate of a will must show:

1. The jurisdictional facts;
2. Whether the person named as executor consents to act, or renounces his right to letters testamentary;
3. The names, ages, and residence of the heirs and devisees of the decedent, so far as known to the petitioner;
4. The probable value and character of the property of the estate;
5. The name of the person for whom letters testamentary are prayed.

No defect of form, or in the statement of jurisdictional facts actually existing, shall make void the probate of a will. [Amendment approved March 24, 1874; Amendments 1873-4, p. 356. In effect July 1, 1874.]

§ 1301. If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator, and that he is named as executor, fails to petition the proper court for the probate of the will, and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for delay is shown.

§ 1302. If it is alleged in any petition that any

will is in the possession of a third person, and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time named in the order. If he has possession of the will, and neglects or refuses to produce it in obedience to the order, he may, by warrant from the court, be committed to the jail of the county, and be kept in close confinement until he produces it.

Probate orders and citations: Secs. 1704-1711.
Imprisonment until order obeyed: Sec. 1219.

§ 1303. When the petition is filed and the will produced, the clerk of the court must set the petition for hearing by the court upon some day not less than ten nor more than thirty days from the production of the will. Notice of the hearing shall be given by such clerk by publishing the same in a newspaper of the county; if there is none, then by three written or printed notices posted at three of the most public places in the county. If the notice is published in a weekly newspaper, it must appear therein on at least three different days of publication; and if in a newspaper published oftener than once a week, it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and the last day being included. If the notice is by posting, it must be given at least ten days before the hearing. [Amendment approved March 3, 1881; Stats. 1881, p. 23.]

Publication of notice: Sec. 1705.

§ 1304. Copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the testator resident in

the State, at their places of residence, if known to the petitioner, and deposited in the postoffice, with the postage thereon prepaid, at least ten days before the hearing. If their places of residence be not known, the copies of notice may be addressed to them, and deposited in the postoffice at the county seat of the county where the proceedings are pending. A copy of the same notice must in like manner be mailed to the person named as executor, if he be not the petitioner; also, to any person named as coexecutor not petitioning, if their places of residence be known. Proof of mailing the copies of the notice must be made at the hearing. Personal service of copies of the notice at least ten days before the day of hearing is equivalent to mailing. [Amendment approved March 24, 1874; Amendments 1873-4, p. 357. In effect July 1, 1874.]

§ 1305. A judge of the superior court may at any time make and issue all necessary orders and writs to enforce the production of wills and the attendance of witnesses. [Amendment approved March 31, 1891; Stats. 1891, 427.]

Probate powers at chambers: Sec. 166.

Probate orders and processes: Sec. 1704 et seq.

§ 1306. At the time appointed for the hearing, or the time to which the hearing may have been postponed, the court, unless the parties appear, must require proof that the notice has been given, which being made, the court must hear testimony in proof of the will. [Amendment approved March 24, 1874; Amendments 1873-4, p. 357. In effect July 1, 1874.]

Testimony in proof of the will: Secs. 1308, 1309, 1315, 1316.

§ 1307. Any person interested may appear and

contest the will. Devisees, legatees, or heirs of an estate may contest the will through their guardians, or attorneys appointed by themselves or by the court for that purpose; but a contest made by an attorney appointed by the court does not bar a contest after probate by the party so represented, if commenced within the time provided in article four of this chapter; nor does the non-appointment of an attorney by the court of itself invalidate the probate of a will. [Amendment approved March 24, 1874; Amendments 1873-4, p. 357. In effect July 1, 1874.]

Contest: Sec. 1312 et seq.
Guardians: Secs. 372, 373, 1747-1809.
Attorneys, generally: Secs. 275-299.
Attorney appointed by the court: Sec. 1718.

§ **1308.** If no person appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution.

Admitting to probate, where contest: Secs. 1314, 1317, 1318; conclusiveness of, sec. 1908, subd. 1.

Will was executed, proof of execution of writing: Sec. 1940.

§ **1309.** An olographic will may be proved in the same manner that other private writings are proved.

Private writings, how proved: Sec. 1940.

ARTICLE II.

CONTESTING PROBATE OF WILLS.

§ 1312. Contestant to file grounds of contest, and petitioner to reply.
§ 1313. How jury obtained and trial had.
§ 1314. Verdict of the jury. Judgment. Appeal.
§ 1315. Witnesses, who and how many to be examined. Proof of handwriting, admitted, when.
§ 1316. Testimony reduced to writing for future evidence.
§ 1317. If proved, certificate to be attached.
§ 1318. Will and proof to be filed and recorded.

§ 1312. If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer provided for in part two, title six, chapter three, of this Code. If the demurrer is sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving:

1. The competency of the decedent to make a last will and testament;

2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence;

3. The due execution and attestation of the will by the decedent or subscribing witnesses; or,

4. Any other questions substantially affecting the validity of the will—

Must, on request of either party in writing, (filed three days prior to the day set for the hearing), be tried by a jury. If no jury is demanded, the court must try and determine the issues joined. On the trial, the contestant is plaintiff and the petitioner is defendant.

Contestants: Sec. 1307.

Contest, after probate: Sec. 1327 et seq.; through attorney appointed by the court, sec. 1307.

Execution: See sec. 1315.

Grounds of demurrer: Secs. 430-434.

Part 2, title 6, chapter 3: See ante, sec. 430.

Attorney, court may appoint, to represent: Sec. 1718.

Service, etc.: Secs. 1010-1017.

§ 1313. When a jury is demanded, the Superior Court must impannel a jury to try the case, in the manner provided for impanneling trial juries in courts of record; and the trial must be conducted in accordance with the provisions of part two, title eight, chapter four, of this Code. A trial by the court must be conducted as provided in part two, title eight, chapter five, of this Code. [Amendment approved April 16, 1880; Amendments 1880, p. 78. In effect April 16, 1880.]

Trial juries, in courts of record, summoning: Secs. 225-228; impanneling, secs. 246, 247.

Conduct of trial: Sec. 607; secs. 600-628.

Trial by the court: Secs. 631-636.

Transfer of proceeding: Secs. 397, 398, 1431-1433.

§ 1314. The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court; upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must

be reduced to writing. If the will is admitted to probate, the judgment, will, and proofs must be recorded.

Special verdict, conclusiveness of: Sec. 1317; verdict, generally, secs. 624-628.

Proofs reduced to writing: See sec. 1316.

§ 1315. If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined, and the death, absence, or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and as evidence of the execution it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them.

Writings, proof of execution: Sec. 1940.

Witnesses, generally: Sec. 1878-1884; attendance of, procuring, sec. 1985 et seq.

§ 1316. The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this State.

§ 1317. If the court is satisfied, upon the proof taken, or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and the facts found, signed by the judge

and attested by the seal of the court, must be attached to the will. [Amendment approved April 15, 1880; Amendments 1880, p. 61. In effect April 16, 1880.]

Seal required: Sec. 153, subd. 2.

§ 1318. The will, and a certificate of the proof thereof, must be filed and recorded by the clerk, and the same, when so filed and recorded, shall constitute part of the record in the cause or proceeding. All testimony shall be filed by the clerk. [Amendment approved April 15, 1880; Amendments 1880, p. 61. In effect April 15, 1880.]

ARTICLE III.

PROBATE OF FOREIGN WILLS.

§ 1322. Wills proved in other States to be recorded, when and where.
§ 1323. Proceedings on the production of a foreign will.
§ 1324. Hearing proofs of probate o foreign will.

§ 1322. All wills duly proved and allowed in any other of the United States, or in any foreign country or State, may be allowed and recorded in the Superior Court of any county in which the testator shall have left any estate. [Amendment approved April 16, 1880; Amendments 1880, p. 61. In effect April 16, 1880.]

§ 1323. When a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the court or judge must appoint a time for the hearing; notice whereof must be given as hereinbefore provided for an original petition for the probate of a will.

Foreign executor, no extra territorial authority: See sec. 1913.

Notice as for an original petition: See sec. 1303 et seq.

Attorney for absent heirs: Sec. 1718.

Petition, notice, etc.: Secs. 1299-1318.

§ 1324. If, on the hearing, it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this State, it must be admitted to probate and have the same force and effect as a will first admitted to probate in this State, and letters testamentary or of administration issued thereon.

Letters testamentary or of administration: Secs. 1349-1362.

ARTICLE IV.

CONTESTING WILL AFTER PROBATE.

§ 1327. The probate may be contested within one year.
§ 1328. Citation to be issued to parties interested.
§ 1329. The hearing had on proof of service.
§ 1330. Petitions to revoke probate of will tried by jury or court. Judgment, what.
§ 1331. On revocation of probate, powers of executor, etc. cease, but not liable for acts in good faith.
§ 1332. Costs and expenses, by whom paid.
§ 1333. Probate, when conclusive. One year after removal of disability given to infants and others.

§ 1327. When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was

proved, a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked.

Allegations against validity of will: See sec. 1312.

Probate, conclusive: Sec. 1333.

§ 1328. Upon filing the petition, a citation must be issued to the executors of the will, or to the administrators with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the State, so far as known to the petitioner; or to their guardians, if any of them are minors; or to their personal representatives, if any of them are dead; requiring them to appear before the court on some day of a regular term, therein specified, to show cause why the probate of the will should not be revoked. [Amendment approved March 24, 1874; Amendments 1873-4, p. 358. In effect July 1, 1874.]

Citation: See secs. 1707-1711.

Guardians: Sec. 1722; sec. 1747 et seq.

§ 1329. At the time appointed for showing cause, or at any time to which the hearing is postponed, personal service of the citations having been made upon any persons named therein, the court must proceed to try the issues of fact joined in the same manner as an original contest of a will.

Proof of notice: See sec. 1306.

Try the issues joined: See sec. 1312.

§ 1330. In all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hear-

ing, a trial by jury must be had as in cases of the contest of an original petition to admit a will to probate. If, upon hearing the proofs of the parties, the jury shall find, or if no jury is had, the court shall decide, that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked.

Jury, trial by: Secs. 1313, 1314.

§ **1331.** Upon the revocation being made, the powers of the executor or administrator with the will annexed must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation.

Acts before revocation, valid: Sec. 1428.

§ **1332.** The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs.

Costs, generally: Sec. 1021 et seq.

§ **1333.** If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind a like period of one year after their respective disabilities are removed. [Amendment approved March 24, 1874; Amendments 1873-4, p. 358. In effect July 1, 1874.]

Conclusiveness of probate: Sec. 1908, subd. 1.; see. also, sec. 1327, ante.

ARTICLE V.

PROBATE OF LOST OR DESTROYED WILL.

§ 1338. Proof of lost or destroyed will to be taken.
§ 1339. Must have been in existence at time of death.
§ 1340. To be certified, recorded, and letters thereon granted.
§ 1341. Court to restrain injurious acts of executors or administrators during proceedings to prove lost will.

§ 1338. Whenever any will is lost or destroyed, the Superior Court must take proof of the execution and validity thereof, and establish the same; notice to all persons interested being first given, as prescribed in regard to proofs of wills in either cases. All the testimony given must be reduced to writing, and signed by the witnesses. [Amendment approved April 16, 1880; Amendments 1880, p. 78. In effect April 16, 1880.]

Notice as to all persons interested: Secs. 1303, 1304; by citation, secs. 1707-1711; service of papers, sec. 1010 et seq.

§ 1339. No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

§ 1340. When a lost will is established, the provisions thereof must be distinctly stated and certified by the judge, under his hand and the seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration, with the will annexed, must be issued thereon in

the same manner as upon wills produced and duly proved. The testimony must be reduced to writing, signed, certified, and filed as in other cases, and shall have the same effect as evidence as provided in section one thousand three hundred and sixteen. [Amendment approved April 16, 1880; Amendments 1880, p. 78. In effect April 16, 1880.]

Certificate: Sec. 1317.
Letters testamentary, etc.: Secs. 1349-1362.

§ 1341. If before, or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors so appointed from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will.

ARTICLE VI.

THE PROBATE OF NUNCUPATIVE WILLS.

§ 1344. Nuncupative wills, when and how admitted to probate.
§ 1345. Additional requirements in probate of nuncupative wills.
§ 1346. Contests and appointments to conform to provisions as to other wills.

§ 1344. Nuncupative wills may at any time, within six months after the testamentary words are spoken by the decedent, be admitted to probate, on petition and notice as provided in article one, chapter two, of this title. The petition, in addition to the jurisdictional facts, must allege that the testamentary words or the substance thereof were reduced to writing within thirty

days after they were spoken, which writing must accompany the petition.

Nuncupative wills, Civil Code, secs. 1288-1291.
Petition and notice: Secs. 1298-1309.

§ 1345. The Superior Court must not receive or entertain a petition for the probate of a nuncupative will until the lapse of ten days from the death of the testator, nor must such petition at any time be acted on until the testamentary words are, or their substance is, reduced to writing and filed with the petition, nor until the surviving husband or wife (if any), and all other persons resident in the State or county interested in the estate, are notified as hereinbefore provided. [Amendment approved April 16, 1880; Amendments 1880, p. 79. In effect April 16, 1880.]

§ 1346. Contests of the probate of nuncupative wills, and appointments of executors and administrators of the estate devised thereby, must be had, conducted, and made as hereinbefore provided in cases of the probate of written wills.

Probate contests: Sec. 1312 et seq.; sec. 1327 et seq.
Contesting appointment of executors, etc.: Secs. 1351-1374.

CHAPTER III.

OF EXECUTORS AND ADMINISTRATORS, THEIR LETTERS, BONDS, REMOVALS, AND SUSPENSIONS.

ARTICLE I.

LETTERS TESTAMENTARY AND OF ADMINISTRATION, WITH THE WILL ANNEXED, HOW AND TO WHOM ISSUED.

§ 1348. Corporations as executors.
§ 1349. To whom letters on proved will to issue.
§ 1350. Who are incompetent as executors or administrators. Letters with will annexed to issue, when.
§ 1351. Interested parties may file objections.
§ 1352. Unmarried woman executrix or administratrix marrying, her authority ceases. Married woman named may be executrix, but not administratrix.
§ 1353. Executor of an executor.
§ 1354. Letters of administration durante minore aetate.
§ 1355. Acts of a portion of executors valid.
§ 1356. Authority of administrators with will annexed. Letters, how issued.

§ 1348. Corporations, authorized by their articles of incorporation to act as executor, administrator, guardian of estates, assignee, receiver, depository, or trustee, and having a paid up capital of not less than two hundred and fifty thousand dollars, of which one hundred thousand dollars shall have been actually paid in in cash, may be appointed to act in such capacity in like manner as individuals. In all cases in which it is required that an executor, administrator, guardian, assignee, receiver, depository, or trustee, shall qualify by taking and subscribing an oath, or in which an affidavit is required, it shall be a sufficient qualification by such corporation, if such oath shall be taken and subscribed, or such affi-

davit made, by the president or secretary or manager thereof; and such officer shall be liable for the failure of such corporation to perform any of the duties required by law to be performed by individuals acting in like capacity and subject to like penalties; and such corporation shall be liable for such failure to the full amount of its capital stock and upon the bond required upon its assuming the trusts provided for herein. [New section approved March 5, 1887; Stats. 1887, p. 21. In effect March 5. 1887.]

§ 1349. The court admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors who are competent to discharge the trust, who must appear and qualify, unless objection is made as provided in section thirteen hundred and fifty-one.

Letters testamentary, form of: Sec. 1360.

Qualification of executors: Secs. 1387-1407; powers before: Civil Code, sec. 1373.

§ 1350. No person is competent to serve as executor who, at the time the will is admitted to probate, is:

1. Under the age of majority;
2. Convicted of an infamous crime;
3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

If the sole executor or all the executors are incompetent, or renounce, or fail to apply for letters, or to appear and qualify, letters of administration, with the will annexed, must be issued as designated and provided for the grant of letters in cases of intestacy. [Amendment approved April

1, 1878; Amendments 1877-8, p. 111. In effect sixty days after passage.]

Incompetent to serve as executors, subd. 1, minor: See sec. 1354, subd. 3.

Some of executors unable to act: Sec. 1354.

Marriage, as affecting competency: Sec. 1352.

Letters of administration with will annexed: Sec. 1356.

§ 1351. Any person interested in a will may file objections in writing, to granting letters testamentary to the persons named as executors, or any of them, and the objections must be heard and determined by the court; a petition may, at the same time, be filed for letters of administration with the will annexed.

Letters of administration with will annexed: Sec. 1356.

§ 1352. A married woman may be appointed an executrix. The authority of an executrix who was unmarried when appointed is not extinguished nor affected by her marriage. [Amendment approved March 19, 1891; Stats. 1891, p. 136.]

Married woman, not to be administratrix: Sec. 1370.

§ 1353. No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator, left unadministered, must be issued.

Letters of administration with will annexed: Sec. 1356.

§ 1354. Where a person absent from the State, or a minor, is named executor—if there is an-

other executor who accepts the trust and qualifies —the latter may have letters testamentary and administer the estate until the return of the absentee or the majority of the minor, who may then be admitted as joint executor. If there is no other executor, letters of administration with the will annexed must be granted; but the court may, in its discretion, revoke them on the return of the absent executor, or the arrival of the minor at the age of majority.

§ 1355. When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust, required by the will, as effectually for every purpose as if all were appointed and should act together; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the State, or laboring under any legal disability from serving, or if he has given his coexecutor or coadministrator authority in writing, to act for both; and where there are more than two executors or administrators, the act of a majority is valid.

Remainder of executors acting, where some incapacitated, etc.: Sec. 1425.

Joint authority: Sec. 15.

Authority of executors, before qualifying, Civ. Code, sec. 1373; before letters revoked, sec. 1428; powers, etc., generally, sec. 1581 et seq.; removals, etc., sec. 1436 et seq.; foreign executor, sec. 1913.

Revocation of probate, effect of: Sec. 1331.

Removals and suspensions: Secs. 1436 et seq.

§ 1356. Administrators with the will annexed have the same authority over the estates which executors named in the will would have, and their acts are as effectual for all purposes. Their let-

ters must be signed by the clerk of the court, and bear the seal thereof.

Executor of executor: See sec. 1353.

ARTICLE II.

FORM OF LETTERS.

§ 1360. Form of letters testamentary.
§ 1361. Form of letters of administration with the will annexed.
§ 1362. Form of letters of administration.

§ 1360. Letters testamentary must be substantially in the following form: State of California, county, or city and county, of ——. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the Superior Court of the county, or city and county, of ——, C. D., who is named therein as such, is hereby appointed executor. Witness, G. H., clerk of the Superior Court of the county, or city and county, of ——, with the seal of the court affixed, the —— day of ——, A. D. 18—. (Seal.) By order of the court. G. H., Clerk. [In effect April 16, 1880.]

Seal, required: Sec. 83, subd. 2; of courts, generally, secs. 147-153.

§ 1361. Letters of administration, with the will annexed, must be substantially in the following form: State of California, county, or city and county, of ——. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the Superior Court of the county, or city and county, of ——, and there being no executor named in the will (or as the case may be), C. D. is hereby appointed administrator with the will annexed. Witness, G. H., Clerk of

the Superior Court of the county, or city and county, of ——, with the seal of the court affixed, the —— day of ——, A. D. 18—. (Seal.) By order of the court. G. H., Clerk. [In effect April 16, 1880.]

§ **1362.** Letters of administration must be signed by the clerk, under the seal of the court, and substantially in the following form: State of California, county, or city and county, of ——. C. D. is hereby appointed administrator of the estate of A. B., deceased. (Seal.) Witness, G. H., Clerk of the Superior Court of the county, or city and county, of ——, with the seal thereof affixed, the —— day of ——, A. D. 18—. By order of the court. G. H., Clerk. [In effect April 16, 1880.]

ARTICLE III.

LETTERS OF ADMINISTRATION, TO WHOM AND THE ORDER IN WHICH THEY ARE GRANTED.

§ 1365. Order of persons entitled to administer. Partner not to administer.
§ 1366. Preference of persons equally entitled.
§ 1367. In discretion of Court to appoint administrator, when.
§ 1368. When minor entitled, who appointed administrator.
§ 1369. Who are incompetent to act as administrators.
§ 1370. Married woman not to be administratrix.

§ **1365.** Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof; and they are, respectively, entitled thereto in the following order:

1. The surviving husband or wife, or some com-

petent person whom he or she may request to have appointed;

2. The children;

3. The father or mother;

4. The brothers;

5. The sisters;

6. The grandchildren;

7. The next of kin entitled to share in the distribution of the estate;

8. The public administrator;

9. The creditors;

10. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate. [Amendment approved April 1, 1878; Amendments 1877-8, p. 111. In effect sixty days after passage.]

Surviving husband or wife, wife's community property, Civ. Code, sec. 1401.

Public administrators, generally: See secs. 1726 et seq.

Subd. 10. Incompetent persons: Secs. 1369, 1370.

Recommendation by one entitled to administer: See sec. 1379.

§ 1366. Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood.

§ 1367. When there are several persons equally entitled to the administration, the court may grant letters to one or more of them; and when a creditor is claiming letters, the court may, in its discretion, at the request of another creditor,

grant letters to any other person legally competent.

See sec. 1355, ante.

§ 1368. If any person entitled to administration is a minor or an incompetent person, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court. [Amendment approved February 27, 1893; Stats. 1893, p. 52; in effect immediately.]

Guardian of minor: Secs. 372, 373, and notes; secs. 1747, 1759.

§ 1369. No person is competent or entitled to serve as administrator or administratrix who is:

1. Under the age of majority;
2. Not a bona fide resident of the State;
3. Convicted of an infamous crime;
4. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity. [Amendment approved April 1, 1878; Amendments 1877-8, p. 112. In effect sixty days after passage.]

Revoking letters: See sec. 1383, post.

§ 1370. A married woman may be appointed administratrix. When an unmarried woman appointed administratrix marries, her authority is not thereby extinguished. [Amendment approved February 24, 1891; Stats. 1891, p. 11. In effect immediately.]

Married woman as executrix: Sec. 1352.

ARTICLE IV.

PETITION FOR LETTERS, AND ACTION THEREON.

§ 1371. Applications, how made.
§ 1372. When granted.
§ 1373. Notice of application.
§ 1374. Contesting application.
§ 1375. Hearing of application.
§ 1376. Evidence of notice.
§ 1377. Grant to any applicant.
§ 1378. What proofs must be made before granting letters of administration.
§ 1379. Letters may be granted to others than those entitled.

§ 1371. Petitions for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages, and residence of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterward proved in the course of administration, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averment.

Orders and decrees need not recite the facts: Sec. 1704.

§ 1372. Letters of administration may be granted by the court at any time appointed for the hearing of the application, or at any time to which the hearing is continued or postponed. [Amendment approved April 16, 1880; Amendments 1880, p. 79. In effect April 16, 1880.]

§ 1373. When a petition praying for letters of administration is filed, the clerk of the court must

set the petition for hearing by the court, and give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing. [Amendment approved March 31, 1891; Stats. 1891, p. 427.]

Posting notices: Compare sec. 1303.

§ 1374. Any person interested may contest the petition, by filing written opposition thereto, on the ground of the incompetency of the applicant, or may assert his own rights to the administration, and pray that letters be issued to himself. In the latter case the contestant must file a petition, and give the notice required for an original petition, and the court must hear the two petitions together.

Incompetency of the applicant: Sec. 1369.

Assert his own rights—persons entitled to administer: Sec. 1365.

§ 1375. On the hearing, it being first proved that notice has been given as herein required, the court must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto.

Proof of notice: Compare sec. 1306.

Conclusive evidence: Sec. 1376.

Hear the proofs, etc.: See sec. 1378.

§ 1376. An entry in the minutes of the court, that the required proof was made and notice given, shall be conclusive evidence of the fact of such notice.

§ **1377.** Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuing of letters to themselves.

Other persons having better rights—may procure revocation: See secs. 1383-1386.

§ **1378.** Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others, and the court may also examine any other person concerning the time, place, and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose.

Witness—compelling attendance of: Sec. 1985 et seq.

§ **1379.** Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the State, affidavits, taken ex parte before any officer authorized by the laws of this State to take acknowledgments and administer oaths out of this State, may be received as prima facie evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court. [Amendment approved April 16, 1880; Amendments 1880, p. 113. In effect April 16, 1880.]

Proof of identity.—Affidavits, secs. 2009-2015; depositions out of the State, secs. 2024-2028; prima facie evidence, sec. 1833.

ARTICLE V.

REVOCATION OF LETTERS AND PROCEEDINGS THEREFOR.

§ 1383. Revocation of letters of administration.
§ 1384. When petition filed, citation to issue.
§ 1385. Hearing of petition for revocation.
§ 1386. Prior rights of relatives entitles them to revoke prior letters.

§ 1383. When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration, by presenting to the court a petition praying the revocation, and that letters of administration may be issued to him. [Amendment approved April 16, 1880; Amendments 1880, p. 80. In effect April 16, 1880.]

Persons incompetent: Secs. 1369, 1370.
Revocation: See secs. 1436-1440.
And see sec. 1386.

§ 1384. When such petition is filed, the clerk must, in addition to the notice provided in section thirteen hundred and seventy-three, issue a citation to the administrator to appear and answer the same at the time appointed for the hearing. [Amendment approved March 24, 1874; Amendments 1873-4, p. 359. In effect July 1, 1874.]

Citation—generally: Secs. 1707-1711.

§ 1385. At the time appointed, the citation having been duly served and returned, the court

must proceed to hear the allegations and proofs of the parties; and if the right of the applicant is established, and he is competent, letters of administration must be granted to him, and the letters of the former administrator revoked.

§ 1386. The surviving husband or wife, when letters of administration have been granted to a child, father, brother, or sister of the intestate; or any of such relatives, when letters have been granted to any other of them, may assert his prior right, and obtain letters of administration, and have the letters before granted revoked in the manner prescribed in the three preceding sections.

ARTICLE VI.

OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS, ETC.

§ 1387. Administrator or executor to take oath. Letters and bond to be recorded.
§ 1388. Bond of administrators, form and requirements of.
§ 1389. Additional bonds, when required.
§ 1390. Condition of bonds.
§ 1391. Each, or more than one administrator, to give separate bonds.
§ 1392. Several recoveries may be had on same bond.
§ 1393. Bonds, and justification of sureties on. Must be approved.
§ 1394. Citation and requirements of judge on deficient bond. Additional security.
§ 1395. Right ceases, when.
§ 1396. When bond may be dispensed with.
§ 1397. Petition showing failing sureties and asking for further bonds.
§ 1398. Citation to executor, etc., to show cause against such application.
§ 1399. Further security may be ordered.
§ 1400. Neglecting to obey order.
§ 1401. Suspending powers of executor, etc.
§ 1402. Further security ordered without application of party in interest.
§ 1403. Release of sureties.
§ 1404. New sureties.
§ 1405. Neglect to give new sureties forfeits letters.
§ 1406. Application to be determined out of term time.
§ 1407. Liability on bond.

§ 1387. Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath before some officer authorized to administer oaths, that he will perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by, executors or administrators, with the affidavits and certificates thereon, must be forthwith recorded by the clerk of the court having jur-

isdiction of the estates, in books to be kept by him in his office for that purpose.

§ **1388.** Every person to whom letters testamentary or of administration are directed to issue, must, before receiving them, execute a bond to the State of California, with two or more sufficient sureties, to be approved by the superior court, or a judge thereof. In form, the bond must be joint and several, and the penalty must not be less than twice the value of the personal property, and twice the probable value of the annual rents, profits, and issues of real property belonging to the estate, which values must be ascertained by the superior court, or a judge thereof, by examining on oath the party applying, and any other persons. [Amendment approved April 16, 1880; Amendments 1880, p. 80. In effect April 16, 1880.]

Sureties: Secs. 1393, 1394, 1397-1400, 1403, 1404, 1407.

Approved by judge, at chambers: Sec. 166.

Bond—condition of, sec. 1390; separate, when sec. 1391; recovery on, secs. 1392, 1407; not required, when, sec. 1396; further security, secs. 1389, 1394-1402; stands as undertaking on appeal, sec. 970.

§ **1389.** The superior court, or a judge thereof, must require an additional bond whenever the sale of any real estate belonging to an estate is ordered; but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given before receiving letters, or of any bond given in place thereof, is equal to twice the value of the personal property remaining in or that will come into the possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the

sale of the real estate ordered to be sold. [Amendment approved April 16, 1880; Amendments 1880, p. 80. In effect April 16, 1880.]

Additional bond may be required of public administrator: Sec. 1727.

Decree settling account binds surety: See secs. 1637, 1638, post.

§ 1390. The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law.

Duties of the trustee: See sec. 1580 et seq.

§ 1391. When two or more persons are appointed executors or administrators, the superior court, or a judge thereof, must require and take a separate bond from each of them. [Amendment approved April 16, 1880; Amendments 1880, p. 80. In effect April 16, 1880.]

§ 1392. The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time, by any person aggrieved, in his own name, until the whole penalty is exhausted.

Sued upon, joining defendants: Sec. 383.

In his own name, party beneficially interested: Sec. 367.

Penalty: Secs. 1388, 1399.

Kind of money, payable under bond: Sec. 1407.

§ 1393. In all cases where bonds or undertakings are required to be given, under this title, the sureties must justify thereon in the same manner and in like amounts as required by section ten hundred and fifty-seven of this Code, and the certificate thereof must be attached to and filed and recorded with the bond or undertaking. All such bonds and undertakings must be ap-

proved by a judge of the superior court before being filed or recorded. [Amendment approved April 16, 1880; Amendments 1880, p. 80. In effect April 16, 1880.]

Approved by judge, at chambers: Sec. 166.

Examination of sureties, when qualifications questioned: Sec. 1394.

§ 1394. Before the judge approves any bond required under this title, and after its approval, he may, of his own motion, or upon the motion of any person interested in the estate, supported by affidavit that the sureties, or some one or more of them, are not worth as much as they have justified to, order a citation to issue requiring such sureties to appear before him at a designated time and place, to be examined touching their property and its value; and the judge must, at the same time, cause a notice to be issued to the executor or administrator requiring his appearance on the return of the citation; and on its return he may examine the sureties and such witnesses as may be produced, touching the property of the sureties and its value; and if, upon such examination, he is satisfied that the bond is insufficient, he must require sufficient additional security. [Amendment approved April 16, 1880; Amendments 1880, p. 81. In effect April 16, 1880.]

Citations: Secs. 1707, 1711.

Additional security, effect of failure to give, in time: Sec. 1395.

§ 1395. If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who will execute a sufficient bond, must be appointed to the administration.

§ 1396. When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary may issue, and sales of real estate be made and confirmed without any bond, unless the court, for good cause, require one to be executed; but the executor may at any time afterward, if it appear from any cause necessary or proper, be required to file a bond, as in other cases. [Amendment approved March 24, 1874; Amendments 1873-4, p. 360. In effect July 1, 1874.]

§ 1397. Any person interested in an estate may, by verified petition, represent to the superior court, or a judge thereof, that the sureties of the executor or administrator thereof have become, or are becoming, insolvent, or that they have removed, or are about to remove, from the State, or that from any other cause the bond is insufficient, and ask that further security be required. [Amendment approved April 16, 1880; Amendments 1880, p. 81. In effect April 16, 1880.]

Ask further security, court may: Sec. 1402.

§ 1398. If the court, or a judge thereof, is satisfied that the matter requires investigation, a citation must be issued to the executor or administrator, requiring him to appear, at a time and place to be therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator, at least five days before the return day. If he has absconded, or cannot be found, it may be served by leaving a copy of it at his place of residence, or by such publication as the court or a judge thereof may order. [Amendment approved April 16, 1880; Amendments 1880, p. 81. In effect April 16, 1880.]

§ 1399. On the return of the citation, or at such other time as the judge may appoint, he

must proceed to hear the proofs and allegations of the parties. If it satisfactorily appears that the security is from any cause insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new bond in the usual form, within a reasonable time, not less than five days.

§ 1400. If the executor or administrator neglects to comply with the order within the time prescribed, the judge must, by order, revoke his letters, and his authority must thereupon cease.

§ 1401. When a petition is presented, praying that an executor or administrator be required to give further security, or to give bond, where by the terms of the will no bond was originally required, and it is alleged on oath that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined.

§ 1402. When it comes to his knowledge that the bond of any executor or administrator is from any cause insufficient, the judge, without any application, must cause him to be cited to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested. [Amendment approved April 16, 1880; Amendments 1880, p. 82. In effect April 16, 1880.]

§ 1403. When a surety of any executor or administrator desires to be released from responsibility on account of future acts, he may make application to the superior court, or a judge thereof, for relief. The court or judge must cause a citation to the executor or administrator to be issued, and served personally, requiring him to appear at

a time and place to be therein specified, and to give other security. If he has absconded, left, or removed from the State, or if he cannot be found, after due diligence and inquiry, service may be made as provided in section one thousand three hundred and ninety-eight. [Amendment approved April 16, 1880; Amendments 1880, p. 82. In effect April 16, 1880.]

§ 1404. If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default, or misconduct of the executor or administrator.

§ 1405. If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application shall consent to a longer extension of time, the court or judge must, by order, revoke his letters.

§ 1406. The applications authorized by the nine preceding sections of this chapter may be heard and determined at any time. All orders made therein must be entered upon the minutes of the court. [Amendment approved April 16, 1880; Amendments 1880, p. 82. In effect April 16, 1880.]

§ 1407. The liability of principal and sureties upon the bond of any executor, administrator, or guardian, is in all cases to pay in the kind of money or currency in which the principal is legally liable. [New section approved March 24, 1874; Amendments 1873-4, p. 361. In effect July 1, 1874.]

ARTICLE VII.

SPECIAL ADMINISTRATORS AND THEIR POWERS AND DUTIES.

§ 1411. Special administrator, when appointed.
§ 1412. Special letters may be issued out of term time.
§ 1413. Preference given to persons entitled to letters.
§ 1414. Special administrator to give bond and take oath.
§ 1415. Duties of special administrator.
§ 1416. When letters testamentary or of administration are granted, special administrator's powers cease.
§ 1417. Special administrator to render account.

§ **1411.** When there is delay in granting letters testamentary or of administration from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an executor or administrator dies, or is suspended, or removed, the superior court, or a judge thereof, must appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate; or he may direct the public administrator of his county to take charge of the estate. [Amendment approved April 16, 1880; Amendments 1880, p. 83. In effect April 16, 1880.]

§ **1412.** The appointment may be made at any time, and without notice, and must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bond, the clerk must issue letters of administration to such person in conformity with the order. [Amendment approved April 16, 1880; Amendments 1880, p. 82. In effect April 16, 1880.]

Oath and bond: See sec. 1414.

§ 1413. In making the appointment of a special administrator, the court or judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment. [Amendment approved April 16, 1880; Amendments 1880, p. 82. In effect April 16, 1880.]

Persons entitled to letters: Sec. 1365 et seq.

§ 1414. Before any letters issue to any special administrator, he must give bond in such sum as the court or judge may direct, with sureties to the satisfaction of the court or judge, conditioned for the faithful performance of his duties; and he must take the usual oath, and have the same indorsed on his letters. [Amendment approved April 16, 1880; Amendments 1880, p. 82. In effect April 16, 1880.]

Oath and bond of administrator, etc.: See secs. 1387-1407.

§ 1415. The special administrator must collect and preserve for the executor or administrator, all the goods, chattels, debts, and effects of the decedent; all incomes, rents, issues, and profits, claims, and demands of the estate; must take the charge and management of, enter upon and preserve from damage, waste, and injury, the real estate; and for any such and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator; he may sell such perishable property as the court may order to be sold, and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the decedent. [Amendment approved April 16, 1880; Amendments 1880, p. 83. In effect April 16, 1880.]

§ 1416. When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands; and the executor or administrator may prosecute to final judgment any suit commenced by the special administrator.

§ 1417. The special administrator must render an account, on oath, of his proceedings in a like manner as other administrators are required to do.

Account of administrator, etc.: Sec. 1622 et seq.

ARTICLE VIII.

WILLS FOUND AFTER LETTERS OF ADMINISTRATION GRANTED, AND MISCELLANEOUS PROVISIONS.

§ 1423. On proof of will, after grant of letters of administration, letters revoked.
§ 1424. Power of executor in such a case.
§ 1425. Remaining administrator or executor to continue when his colleagues are disqualified.
§ 1426. Who to act when all acting are incompetent.
§ 1427. Executor or administrator may resign, when. Court to appoint successor. Liability of outgoer.
§ 1428. All acts of executor, etc., valid until his power is revoked.
§ 1429. Transcript of court minutes to be evidence.

§ 1423. If, after granting letters of administration on the ground of intestacy, a will of the decedent is duly proved and allowed by the court, the letters of administration must be revoked, and the power of the administrator ceases, and he must render an account of his administration within such time as the court shall direct.

Account of administration: Sec. 622 et seq.

§ **1424.** In such case, the executor or the administrator with the will annexed is entitled to demand, sue for, recover and collect all the rights, goods, chattels, debts and effects, of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration.

Inventory and collection of decedent's effects: Secs. 1443-1453.

§ **1425.** In case any one of several executors or administrators to whom letters are granted, dies, becomes lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust, or in case the letters testamentary or of administration are revoked or annulled, with respect to any one executor or administrator, the remaining executor or administrator must proceed to complete the execution of the will or administration.

§ **1426.** If all such executors or administrators die or become incapable, or the power and authority of all of them is revoked, the court must issue letters of administration, with the will annexed or otherwise, to the widow or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions, as hereinbefore required of administrators, and shall have the like power and authority. [Amendment, approved April 16, 1880; Amendments, 1880, p. 83. In effect April 16, 1880.]

Letters of administration—order and manner of granting, sec. 1365 et seq.; with will annexed, sec. 1356.

Oath and bond: Secs. 1387-1407.

Power and authority: Sec. 1581 et seq.

§ 1427. Any executor or administrator may, at any time, by writing, filed in the Superior Court, resign his appointment, having first settled his accounts and delivered up all the estate to the person whom the court shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may, at any time before settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not be in any manner discharged, released, or affected by such appointment or resignation. [Amendment, approved April 16, 1880; Amendments 1880, p. 83. In effect April 16, 1880.]

§ 1428. All acts of an executor or administrator as such, before the revocation of his letters testamentary or of administration, are as valid to all intents and purposes as if such executor or administrator had continued lawfully to execute the duties of his trust.

§ 1429. A transcript from the minutes of the court, showing the appointment of any person as executor or administrator, together with the certificate of the clerk under his hand and the seal of his court, that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him and have not been revoked shall have the same effect in evidence as the letters themselves.

Letters and bond recored: Sec. 1387.

ARTICLE IX.

DISQUALIFICATION OF JUDGES AND TRANSFERS OF ADMINISTRATIONS.

§ 1430. When judge not to act.
§ 1431. Judge being disqualified, proceedings to be transferred, and where.
§ 1432. Transfer not to change right to administer. Retransfer, how made.
§ 1433. When proceedings to be returned to original court.

§ 1430. No will shall be admitted to probate, or letters testamentary or of administration granted ,before any judge who is interested as next of kin to the decedent, or as a legatee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto, or is in any other manner interested or disqualified from acting. [Amendment, approved April 16, 1880; Amendments 1880, 83. In effect April 16, 1880.]

§ 1431. When a petition is filed in the superior court, praying for admission to probate of a will, or for granting letters testamentary or of administration, or when proceedings are pending in the superior court for the settlement of an estate, and there is no judge of said court qualified to act, an order must be made transferring the proceedings to the superior court of an adjoining county, and the clerk of the court ordering the transfer must transmit to the clerk of the court to which the proceedings are ordered to be transferred a certified copy of the order and all papers on file in his office in the proceedings; and thereafter the court to which the proceeding is transferred shall exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof, as if it had

original jurisdiction of the estate; provided, there shall not be any necessity for transferring such proceedings, or any of them, when a judge of some other county qualified to act attends at the request of the judge of the county where such proceedings are pending, to hold court, to conduct and to try such proceedings; and such judge, when so called upon to preside, shall exercise jurisdiction over any proceeding in the estate as is exercised in other cases under like circumstances. [Amendment, approved March 31, 1891; Stats. 1891, 435.]

§ 1432. The transfer of a proceeding from one court to another as provided for in the preceding section, shall not affect the right of any person to letters testamentary or of administration on the estate transferred, but the same persons are entitled to letters testamentary or of administration on the estate, in the order hereinafter provided. If, before the administration is closed of any estate so transferred as herein provided, another person is elected or appointed, and qualified as judge of the court wherein such proceeding was originally commenced, who is not disqualified to act in the settlement of the estate, and the causes for which the proceeding was transferred no longer exist, any person interested in the estate may have the proceeding returned to the court from which it was originally transferred, by filing a petition setting forth these facts, and moving the court therefor. [Amendment, approved April 16, 1880; Amendments 1880, 84. In effect April 16, 1880.]

§ 1433. On hearing the motion, if the facts required by the preceding section to be set out in the petition are satisfactorily shown, and it further appears to the court that the convenience of the parties interested would be promoted by such

change, the judge must make an order transferring the proceeding back to the court where it was originally commenced; and the clerk of the court ordering the transfer must transmit to the clerk of the court in which the proceeding was originally commenced, a certified copy of the order, and all the original papers on file in his office in the proceeding; and the court where the proceeding was originally commenced shall thereafter have jurisdiction and power to make all necessary orders and decrees to close up the administration or the estate. [Amendment, approved April 16, 1880; Amendments 1880, 84. In effect April 16, 1880.]

ARTICLE X.

REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

§ 1436. Suspension of powers of executor.
§ 1437. Executor to have notice of his suspension, and to be cited to appear.
§ 1438. Any party interested may appear on hearing.
§ 1439. Notice to absconding executors and administrators.
§ 1440. May compel attendance.

§ 1436. Whenever a judge of a Superior Court has reason to believe, from his own knowledge, or from credible information, that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, or has committed or is about to commit a fraud upon the estate, or is incompetent to act, or has permanently removed from the State, or has wrongfully neglected the estate, or has long neglected to perform any act as such executor or administrator, he must, by an order entered upon the minutes of the court, suspend the powers of such executor or administrator, until the matter is investigated. [Amendment approved April 16, 1880; Amendments 1880, 84. In effect April 16th, 1880.]

Misconduct of executor—as to inventory: Sec. 1450; as to exhibit and account: Secs. 1626, 1627, 1630.

Suspension of executor, etc.—done at chambers: Sec. 166.

Removal of executor: See ante, sec. 1383.

§ 1437. When such suspension is made, notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or, if appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked, and letters of administration granted anew, as the case may require.

§ 1438. At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the executor or administrator should be removed; to which the executor or administrator may demur or answer, as hereinbefore provided. The issues raised must be heard and determined by the court.

§ 1439. If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the State, notice may be given him of the pendency of the proceedings by publication, in such manner as the court may direct, and the court may proceed upon such notice as if the citation had been personally served.

Compare: Sec. 1630.

§ 1440. In the proceedings authorized by the preceding sections of this article, for the removal of an executor or administrator, the court may compel his attendance by attachment, and may compel him to answer questions, on oath, touch-

ing his administration, and, upon his refusal so to do, may commit him until he obey, or may revoke his letters, or both.

Compelling obedience: Compare secs. 1627, 1628; as to contempt: See secs. 1209, 1219.

CHAPTER IV.

OF THE INVENTORY AND COLLECTION OF THE EFFECTS OF DECEDENTS.

Article I. Inventory, Appraisement, and Possession of Estate.
II. Embezzlement and Surrender of Property of Estate.

ARTICLE I.

INVENTORY, APPRAISEMENT, AND POSSESSION OF ESTATE.

§ 1443. Inventory to be returned, including the homestead.
§ 1444. Appraisement and pay of appraisers.
§ 1445. Oath of appraisers and inventory, how made.
§ 1446. Inventory to account for moneys. If all money, no appraisement necessary.
§ 1447. Effect of naming a debtor executor.
§ 1448. Discharge or bequest of debt against executor.
§ 1449. To make oath to inventory.
§ 1450. Letters may be revoked for neglect of administrator.
§ 1451. Inventory of after-discovered property.
§ 1452. Administrator and executor to possess real and personal estate.
§ 1453. Executor or administrator to deliver real estate to heirs or devisees at the end of ten months, unless there are debts to be satisfied.

§ **1443.** Every executor or administrator must make and return to the court, within three months after his appointment, a true inventory and appraisement of all the estate of the decedent, in-

cluding the homestead, if any, which has come to his possession or knowledge. [Amendment approved April 16, 1880; Amendments 1880, 85. In effect April 16th, 1880.]

§ **1444.** To make the appraisement, the court or a judge thereof must appoint three disinterested persons (any two of whom may act), who are entitled to receive a reasonable compensation for their services, not to exceed five dollars per day, to be allowed by the court or judge. The appraisers must, with the inventory, file a verified account of their services and disbursements. If any part of the estate is in any other county than that in which letters issued, appraisers thereof may be appointed, either by the court or judge having jurisdiction of the estate or by the court or judge of such other county, on request of the court or judge having jurisdiction. No clerk or deputy, nor any person related by consanguinity or affinity to or connected by marriage or in business with the judge of the court, shall be appointed or shall be competent to act as appraiser in any estate, or matter or proceeding pending before such judge or in said court. [Amendment approved March 23, 1893; Stats, 1893, 185.]

Appraisers—duty as to homestead: Secs. 1476, 1486; appointed at chambers: Sec. 166.

§ **1445.** Before proceeding to the execution of their duty, the appraisers, before any officer authorized to administer oaths, must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly, and impartially appraise the property exhibited to them, according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with the value thereof in dollars and cents, in figures, opposite to the articles, respectively; the

inventory must contain all the estate of the decedent, real and personal, a statement of all debts, partnerships, and other interests, bonds, mortgages, notes, and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, (if any) with their dates, and the sum which, in the judgment of the appraiser, may be collected on each debt, interest, or security; the inventory must show, so far as the same can be ascertained by the executor or the administrator, what portion of the property is community property, and what portion is the separate property of the decedent.

§ 1446. The inventory must also contain an account of all moneys belonging to the decedent which have come to the hands of the executor or administrator; and if none, the fact must be so stated in the inventory. If the whole estate consists of money, there need not be an appraisement, but an inventory must be made and returned as in other cases.

§ 1447. The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due.

§ 1448. The discharge or bequest in a will, of any debt or demand of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the debt or demand. It must be included in the inventory, and if necessary, applied in the payment of the debts. If not neces

sary for that purpose, it must be paid in the same manner and proportion as other specific legacies.

§ 1449. The inventory must be signed by the appraisers, and the executor or administrator must take and subscribe an oath before an officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge and possession, and particularly of all money belonging to the decedent, and of all just claims of the decedent against the affiant. The oath must be indorsed upon or annexed to the inventory.

§ 1450. If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the court or judge shall for reasonable cause allow, the court may, upon notice, revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate, or any person interested therein, arising from such failure.

§ 1451. Whenever property not mentioned in an inventory that is made and filed, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this article, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced, after notice, by attachment or removal from office.

Enforced by attachment, etc.: Compare sec. 1440.

§ 1452. The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is

settled, or until delivered over by order of the court to the heirs or devisees; and must keep in good tenantable repair all houses, buildings, and fixtures thereon which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator; but this section shall not be so construed as requiring them so to do. [Amendment approved April 16, 1880; Amendments 1880, 85. In effect April 16th, 1880.]

Authority of executors: Sec. 1355.

Possession of estate: See sec. 1581; when that of heirs, etc.: Sec. 1581; as to partnership property: See sec. 1585.

Until delivered to heirs: See sec. 1453.

Action by executor, etc.: Secs. 1458, 1581, 1582 et seq.

§ 1453. Unless it satisfactorily appear to the court that the rents, issues, and profits of the real estate for a longer period are necessary to be received by the executor or administrator, wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, the court, at the end of the time limited for the presentation of claims against the estate, must direct the executor or administrator to deliver possession of all the real estate to the heirs-at-law or devisees. [Amendment approved April 16, 1880; Amendments 1880, 85. In effect April 16th, 1880.]

New Section 1453 — page 107

ARTICLE II.

EMBEZZLEMENT AND SURRENDER OF PROPERTY OF THE ESTATE.

§ 1458. Embezzling estate before grant of letters testamentary.
§ 1459. Citation to persons suspected to have embezzled estate, etc.
§ 1460. Refusal to obey citation, penalty for, and for embezzlement. May be compelled to disclose by imprisonment. Liable for double damages.
§ 1461. Persons intrusted with the estate of decedent may be cited to account.

§ 1458. If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he is chargeable therewith and liable to an action by the executor or administrator of the estate, for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.

Action by executors, etc.—generally: Secs. 1452, 1460, 1581 et seq.

§ 1459. If any executor, administrator, or other person interested in the estate of a decedent, complains to the Superior Court, or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon

the matter of such complaint. If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined either before the Superior Court of the county where he is found, or before the Superior Court of the county where the decedent dies, or where letters have been granted. But if, in the latter case, he appears and is found innocent his necessary expenses must be allowed him out of the estate. [Amendment approved April 16, 1880; Amendments 1880, 86. In effect April 16th, 1880.]

§ 1460. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidences of or tending to disclose the right, title, interest, or claim of the decedent to any real or personal estate, claim, or demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order for such disclosure made upon such examination shall be prima facie evidence of the right of the executor or administrator to such property in any action

brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side. [Amendment approved April 16, 1880; Amendments 1880, 86. In effect April 16th, 1880.]

Contempt: Secs. 1209, 1219.

§ 1461. The Superior Court, or a judge thereof, upon the complaint, on oath, of any executor or administrator, may cite any person who has been intrusted with any part of the estate of the decedent, to appear before such court, and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts, or other property or papers belonging to the estate, which have come to his possession in trust for the executor or administrator, and of his proceedings thereon; and if the person so cited refuses to appear and render such account, the court may proceed against him as provided in the preceding section. [Amendment approved April 16, 1880; Amendments 1880, 86. In effect April 16th, 1880.]

CHAPTER V.

OF THE PROVISION FOR THE SUPPORT OF THE FAMILY, AND OF THE HOMESTEAD.

Article I. Of the Provision for the Support of the Family.
II. Of the Homestead.

ARTICLE I.

OF THE PROVISION FOR THE SUPPORT OF THE FAMILY.

§ 1464. Widow and minor children may remain in decedent's house, etc.
§ 1465. All property exempt from execution to be set apart for use of family.
§ 1466. May make extra allowance.
§ 1467. Payment of allowance.
§ 1468. Property set apart, how apportioned between widow and children.
§ 1469. Estate less than fifteen hundred dollars to go to wife and child; those less than three thousand to be summarily administered.
§ 1470. When all property to go to children.

§ 1464. When a person dies, leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, of all the wearing apparel of the family, and of all the household furniture of the decedent, and are also entitled to a reasonable provision for their support, to be allowed by the Superior Court, or a judge thereof. [Amendment approved April 16, 1880; Amendments 1880, 87. In effect April 16th, 1880.]

Provisions for support of family: secs. 1466, 1467. 1467.

§ 1465. Upon the return of the inventory, or at any subsequent time during the administration,

Continued page 102

the court may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated, and recorded; provided such homestead was selected from the common property, or from the separate property, of the persons selecting or joining in the selection of the same. If none has been selected, designated, and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children; or if there be no surviving husband or wife, then for the use of the minor children, in the manner provided in article two of this chapter, out of the common property, or if there be no common property, then out of the real estate belonging to the decedent. [Amendment approved April 16, 1880; Amendments 1880, 87. In effect April 16th, 1880.]

Attorney, court may appoint to represent party: Sec. 1718.

Appeal from order setting apart homestead, or refusing so to do: See sec. 1716, post.

§ **1466.** If the amount set apart be insufficient for the support of the widow and children, or either, the court or a judge thereof must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration. [Amendment approved Ap-

ril 16, 1880; Amendments 1880, 87. In effect April 16th, 1880.]

§ 1467. Any allowance made by the court or judge, in accordance with the provisions of this article, must be paid in preference to all other charges, except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent.

§ 1468. When property is set apart to the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow or surviving husband, the whole belongs to the minor child or children. If the property set apart be a homestead, selected from the separate

the court can only set it

PROBATE LAW — ESTATE LESS THA
FIFTEEN HUNDRED DOLLARS — N
TICE TO CREDITORS — REMOVAL C
ADMINISTRATRIX.

Under section 1469 of the Code of Civil Pr
cedure the widow of a decedent is entitled
have his whole estate set apart to her if it do
not exceed fifteen hundred dollars, and no noti
to creditors is required to be given, and th
widow, who has been appointed administratrix
cannot be removed for failure to publish notice
to creditors for two months after her appointment
In such a case.
Estate of Atwood, 19 Cal. Dec., 29.
(See Underta kings.)

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Attorney, cou
Sec. 1718.

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nother room, closed the door behind him, and

(See Evidence.)

ril 16, 1880; Amendments 1880, 87. In effect April 16th, 1880.]

§ 1467. Any allowance made by the court or judge, in accordance with the provisions of this article, must be paid in preference to all other charges, except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent.

§ 1468. When property is set apart to the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow or surviving husband, the whole belongs to the minor child or children. If the property set apart be a homestead, selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order. [Amendment approved Feb. 19, 1881; Amendments 1881, 8. Approved February 19th, 1881.]

Where widow has a maintenance: Sec. 1470.

§ 1469. If, upon the return of the inventory of the estate of a deceased person, it shall appear therefrom that the value of the whole estate does not exceed the sum of fifteen hundred dollars, and if there be a widow or minor children of the deceased, the court, or a judge thereof, shall, by order, require all persons interested to appear on a day fixed, to show cause why the whole of said

estate should not be assigned for the use and support of the family of the deceased. Notice thereof shall be given and proceedings had in the same manner as provided in sections one thousand six hundred and thirty-three, one thousand six hundred and thirty-five, and one thousand six hundred and thirty-eight of this Code. If, upon the hearing, the court finds that the value of the estate does not exceed the sum of fifteen hundred dollars, it shall, by decree for that purpose, assign to the widow of the deceased, if there be a widow, if no widow, then to the minor children of the deceased, if there be minor children, the whole of the estate, subject to whatever mortgages, liens, or incumbrances there may be upon said estate at the time of the death of the deceased, after the payment of the expenses of the last illness of the deceased, funeral charges, and expenses of administration, and the title thereof shall rest absolutely in such widow or minor children, subject to whatever mortgages, liens, or incumbrances there may be upon said estate at the time of the death of the deceased, and there must be no further proceedings in the administration, unless further estate be discovered. [Approved February 16, 1897; Stats. 1897, c. 10. In effect immediately.]

Act authorizing next of kin of decedent to collect deposit in bank of less than three hundred dollars. See post, Appendix, 814.

§ 1470. If the widow has a maintenance derived from her own property equal to the portion set apart to her by the preceding sections of this article, the whole property so set apart, other than the homestead, must go to the minor children. [Amendment approved April 16, 1880; Amendments 1880, 88. In effect April 16th, 1880.]

ARTICLE II.

OF THE HOMESTEAD.

§ 1474. Rights of survivor to homestead.
§ 1475. Selected and recorded homestead set off to person entitled. Subsisting liens to be paid by solvent estate.
§ 1476. Appraisers to carve out of the original, exceeding five thousand dollars in value, a homestead, and report the same.
§ 1477. Report of the appraisers. Majority and minority, which may be confirmed.
§ 1478. Day to be set for confirming or rejecting the report of the appraisers. Appeal.
§ 1479. If report rejected, other appraisers appointed. If again rejected, partition suit to be prought.
§ 1480. Instead of dividing the homestead, who may take a deed thereof at appraised value.
§ 1481. If no homestead is selected and recorded prior to death of decedent, one may be petitioned for.
§ 1482. Court to direct partition suit in the District Court, when. Proceedings thereon. .
§ 1483. If property is common or separate, court to cause appraisement and admeasurement to be made.
§ 1484. New appraisement, when ordered. Instead of deeding property at appraised value, public sale to be ordered, when.
§ 1485. Costs, to whom chargeable. Persons succeeding to rights of homestead owners have all their powers and rights.
§ 1486. Certified copies of certain orders to be recorded.

§ 1474. If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was

selected, in his or her heirs, subject to the power of the Superior Court to assign it for a limited period to the family of the decedent. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the Civil Code. [Amendment approved April 16, 1880; Amendments 1880, 88. In effect April 16th, 1880.]

Homestead—generally, and setting apart: Sec. 1465.

§ **1475.** If the homestead selected and recorded prior to the death of the decedent be returned in the inventory appraised at not exceeding five thousand dollars in value, or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, the Superior Court must, by order, set it off to the persons in whom title is vested by the preceding section. If there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate. If the funds of the estate be adequate to pay all claims against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed, and the liens or incumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment. [Amendment approved April 16, 1880; Amendments 1880, 88. In effect April 16th, 1880.]

§ **1476.** If the homestead, as selected and recorded, be returned in the inventory appraised at more than five thousand dollars, the appraisers must, before they make their return, ascertain

and appraise the value of the homestead at the time the same was selected, and if such value exceeded five thousand dollars, or if the homestead was appraised as provided in the Civil Code, and such appraised value exceeded that sum, the appraisers must determine whether the premises can be divided without material injury, and if they find that they can be thus divided, they must admeasure and set apart to the parties entitled thereto, such portion of the premises, including the dwelling-house, as will amount in value to the sum of five thousand dollars, and make report thereof, giving the metes, bounds, and full description of the portion set apart as a homestead. If the appraisers find that the premises exceeded in value, at the time of their selection, the sum of five thousand dollars, and that they cannot be divided without material injury, they must report such finding, and thereafter the court may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto. [Amendment approved March 24, 1874; Amendments 1873-4, 363. In effect July 1st, 1874.]

Appraisement—generally: Sec. 1444.

§ 1477. Any two of the appraisers concurring may discharge the duties imposed upon the three, and make the report. A dissenting report may be made by the third appraiser. The report must state fully the acts of the appraisers. Both reports may be heard and considered by the court in determining a confirmation or rejection of the majority report, but the minority report must in no case be confirmed.

§ 1478. When the report of the appraisers is filed, the court must set a day for hearing any objections thereto, from any one interested in the estate. Notice of the hearing must be given for such time, and in such manner as the court may

direct. If the court be satisfied that the report is correct, it must be confirmed, otherwise rejected. In case the report is rejected, the court may appoint new appraisers to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of their report as upon the first report. [Amendment approved March 24, 1874; Amendments 1873-4, 363. In effect July 1st, 1874.]

§§ 1479, 1480, 1481, 1482, 1483, 1484 are repealed. [In effect July 1st, 1874.]

§ 1485. The costs of all proceedings in the Superior Court provided for in this chapter, must be paid by the estate as expenses of administration. Persons succeeding by purchase or otherwise to the interests, rights, and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefit conferred by the law on the persons whose interests and rights they acquire. [Amendment approved April 16, 1880; Amendments 1880, 89. In effect April 16th, 1880.]

§ 1486. A certified copy of every final order made in pursuance of this article, by which a report is confirmed, property assigned, or sale confirmed, must be recorded in the office of the recorder of the county where the homestead property is situated.

Certified copy—recording: See sec. 1719.

CHAPTER VI.

OF CLAIMS AGAINST THE ESTATE.

§ §490. Notice to creditors. Additional notice.
§ 1491. Time expressed in the notice.
§ 1492. Copy and proof of notice to be filed and order made.
§ 1493. Time within which claims against an estate must be presented.
§ 1494. Claims to be sworn to, and when allowed, to bear same interest as judgments.
§ 1495. Probate judge may present claim, and action thereon.
§ 1496. Allowance and rejection of claims.
§ 1497. Approved claims or copies to be filed. Claims secured by liens may be described. Lost claims.
§ 1498. Rejected claims to be sued for within three months.
§ 1499. Claims barred by Statute of Limitations. When and who probate judge may examine.
§ 1500. Claims must be presented before suit.
§ 1501. Time of limitation.
§ 1502. Claims in action pending at time of decease.
§ 1503. Allowance of claim in part.
§ 1504. Effect of judgment against executor.
§ 1505. Execution not to issue after death. If one is levied the property may be sold.
§ 1506. What judgment is not a lien on real property of estate.
§ 1507. May refer doubtful claims. Effect of referee's allowance of rejection.
§ 1508. Trial by referee, how confirmed and its effect.
§ 1509. Liability of executor, etc., for costs.
§ 1510. Claims of executor, etc., against estate.
§ 1511. Executor neglecting to give notice to creditors, to be removed.
§ 1512. Executor to return statement of claims.
§ 1513. Court may order payment of interest to cease, when

§ 1490. Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with

the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the judge or court shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation.

Publication of notice—how often: Sec. 1705.

Two months' neglect—to give notice, causes revocation of letters: Sec. 1511.

1491. The time expressed in the notice must be ten months after its first publication when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not.

§ **1492.** After the notice is given, as required by the preceding section, a copy thereof, with the affidavit of due publication, or of publication and posting, must be filed, and upon such affidavit or other testimony to the satisfaction of the court, an order or decree showing that due notice to creditors has been given, and directing that such order or decree be entered in the minutes and recorded, must be made by the court.

Affidavit of publication—of notice: Secs. 2010, 2011.

§ **1493.** All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court, or a judge thereof, that the claimant had no notice as provided in this

chapter, by reason of being out of the State, it may be presented at any time before a decree of distribution is entered. [Amendment approved April 16, 1880; Amendments 1880, 89. In effect April 16th, 1880.]

Claim—action, none unless claim presented: Sec. 1500; after rejection: Sec. 1498; pending at death, claim must be presented: Sec. 1502; affidavit: Sec. 1494; allowance or rejection of: Secs. 1496-1498, 1503; contingent: Sec. 1648; executor, action by: Sec. 1510; against judgment on: Secs. 1504, 1509, interest on: Secs. 1494, 1513; Judge of Superior Court: Sec. 1495; judgment, against decedent, Sec. 1505; action barred by statute: Secs. 1499, 1501; examination by judge: Sec. 1499; on mortgage, or lien: Sec. 1500; Reference of: Sec. 1507; statement of claims: Sec. 1512.

Partnership: Sec. 1585.

Contingent claims: Sec. 1648.

§ 1494. Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate be insolvent no greater rate of interest shall be allowed upon any claim after the first publication of notice to creditors than is allowed on judgments obtained in the Superior Court.

[Amendment approved April 16, 1880; Amendments 1880, 89. In effect April 16th, 1880.]

Claim on mortgage or lien: See sec. 1500.

Claim paid without affidavit and allowance when allowed executor. See post, Appendix, p. 815.

§ 1495. Any judge of a Superior Court may present a claim against the estate of a decedent for allowance to the executor or administrator thereof, and if the executor or administrator allows the claim, he must in writing designate some other judge of the Superior Court of the same or an adjoining county, who, upon the presentation of such claim to him, is vested with power to allow or reject it, and the judge presenting such claim, in case of its rejection by the executor or administrator, or by such judge as shall have acted upon it, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected. [Amendment approved April 16, 1880; Amendments 1880, 89. In effect April 16th, 1880.]

§ 1496. When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to a judge of the Superior Court for his approval, who must in the same manner indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day; and if the presentation be made by a notary, the certificate of such notary, under seal, shall be prima facie evidence of such presentation

and the date thereof. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time. If the claim be payable in a particular kind of money or currency, it shall, if allowed, be payable only in such money or currency. [Amendment approved April 16, 1880; Amendments 1880, 90. In effect April 16th, 1880.]

Judge may approve claims in chambers: Sec. 167.

§ **1497**. Every claim allowed by the executor or administrator, and approved by a judge of the Superior Court, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim be founded on a bond, bill, note, or any other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited, if demanded, unless it be lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. If the claim, or any part thereof, be secured by a mortgage, or other lien which has been recorded in the office of the recorder of the county in which the land affected by it lies, it shall be sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record. If, in any case, the claimant has left any original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy thereof has been already, or is then, attached to his claim. A brief description

of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest, and date of allowance. [Amendment approved April 16, 1880; Amendment 1880, 90. In effect April 16th, 1880.]

Claim secured by mortgage, etc.: See sec. 1500.

§ 1498. When a claim is rejected either by the executor or administrator, or a judge of the Superior Court, the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred. [Amendment approved April 16, 1880; Amendments 1880, 91. In effect April 16, 1880.]

Time for bringing suit: Sec. 1501.

§ 1499. No claim must be allowed by the executor or administrator, or by a judge of the Superior Court, which is barred by the Statute of Limitations. When a claim is presented to a judge for his allowance, he may, in his discretion, examine the claimant and others on oath, and hear any legal evidence touching the validity of the claim. [Amendment approved April 16, 1880; Amendments 1880, 91. In effect April 16th, 1880.]

Statute of Limitations: Secs. 335-363; object of: Sec. 353; vacancy in administration does not affect, sec. 1501.

§ 1500. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case; an action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all the recourse against any other property of the estate is ex-

pressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented. [Amendment approved March 15, 1876; Amendments 1875-6, 103. In effect March 15, 1876.]

Secured claims against estate: See supra, sec. 1493. With respect to incumbrances upon the homestead: See sec. 1475, ante.

§ 1501. The time during which there shall be a vacancy in the administration must not be included in any limitations herein prescribed.

§ 1502. If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required.

§ 1503. Whenever any claim is presented to an executor or administrator, or to a judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action therefor brought against the executor or administrator, unless he recover a greater amount than that offered to be allowed. [Amendment approved April 16, 1880; Amendments 1880, 91. In effect April 16th, 1880.]

§ 1504. A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge; and the judgment must be that the executor or administrator pay, in due course of

administration, the amount ascertained to be due. A certified transcript of the original docket of the judgment must be filed among the papers of the estate in court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment. [Amendment approved April 16, 1880; Amendments 1880, 91. In effect April 16th, 1880.]

§ 1505. When any judgment has been rendered for or against the testator, intestate in his lifetime, no execution shall issue thereon after his death, except as provided in section six hundred and eighty-six. A judgment against the decedent for the recovery of money must be presented to the executor or administrator like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living. [Amendment approved March 28, 1874; Amendments 1873-4, 413. In effect March 28th, 1874.]

§ 1506. A judgment rendered against a decedent, dying after verdict or decision on an issue of fact, but before judgment is rendered thereon, is not a lien on the real property of the decedent, but is payable in due course of administration.

§ 1507. If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement, in writing, with

the claimant, to refer the matter in controversy to some disinterested person, to be approved by the superior court, or a judge thereof. Upon filing the agreement and approval of such court or judge, in the office of the clerk of the court for the county in which the letters testamentary or of administration were granted, the clerk must enter a minute of the order referring the matter in controversy to the person so selected; or, if the parties consent, a reference may be had in the court; and the report of the referee, if confirmed, establishes or rejects the claim the same as if it had been allowed or rejected by the executor or administrator and judge. [Amendment approved April 16, 1880; Amendments 1880, p. 91. In effect July 16, 1880.]

§ **1508.** The referee must hear and determine the matter, and make his report thereon to the court in which his appointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation, and subject to the same control, as in other cases of reference. The court may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs, as in actions against executors or administrators, and the judgment of the court thereon shall be as valid, and effectual, in all respects, as if the same had been rendered in a suit commenced by ordinary process.

Reference: Secs. 638-645.

§ **1509.** When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause.

§ 1510. If the executor or administrator is a creditor of the decedent, his claim duly authenticated by affidavit must be presented for allowance or rejection to a judge of the superior court, and its allowance by the judge is sufficient evidence of its correctness, and must be paid as other claims in due course of administration. If, however, the judge reject the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who may appoint an attorney, at the expense of the estate, to defend the action. If the claimant recover no judgment, he must pay all costs, including defendant's reasonable attorney's fees, to be fixed by the court. [Amendment approved April 16, 1880; Amendments 1880, p. 92. In effect April 16, 1880.]

Claim: Sec. 1493.

§ 1511. If an executor or administrator neglects, for two months after his appointment, to give notice to creditors, as prescribed by this chapter, the court must revoke his letters, and appoint some other person in his stead, equally or the next in order entitled to the appointment.

§ 1512. At the same time at which he is required to return his inventory, the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court, or a judge thereof, and from time to time thereafter he must present a statement of claims subsequently presented to him, if so required by the court, or a judge thereof. In all such statements he must designate the names of the creditors, the nature of each claim, when it became due, or will become due, and whether it was allowed or rejected by him. [Amendment approved April 16, 1880; Amendments 1880, p. 92. In effect April 16, 1880.]

§ 1513. If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid. This section does not apply to existing debts, unless the creditor consent to accept the amount. [New section approved March 24, 1874; Amendments 1873-4, p. 366. In effect July 1, 1874.]

Payment of debts of estate, generally: Sec. 1643 et seq.

CHAPTER VII.

OF SALES AND CONVEYANCES OF PROPERTY OF DECEDENTS.

Article I. Sales in General.
II. Sales of Personal Property.
III. Summary Sales of Mines and Mining Interests.
IV. Sales of Real Estate, Interests therein, and Confirmation thereof.

ARTICLE I.

SALES IN GENERAL.

§ 1516. Personal estate first chargeable. Real estate, when sold.
§ 1517. No sales valid except by order of Superior Court.
§ 1518. Applications for orders of sale.
§ 1519. But one petition, order, and sale must be had when it is possible to do so.

§ 1516. All the property of a decedent shall be chargeable with the payment of the debts of the deceased, the expenses of administration, and the allowance to the family, except as otherwise pro-

vided in this Code, and in the Civil Code. And the said property, personal and real, may be sold as the court may direct, in the manner prescribed in this chapter. There shall be no priority as between personal and real property for the above purposes. [Amendment approved March 24, 1874; Amendments 1873-4, p. 367. In effect July 1, 1874.]

All property chargeable for debts, etc.; Civil Code, sec. 1358; order of appropriation, Civil Code, sec. 1359; and see secs 1560-1564, post.

Personal and real property, appropriated without distinction: See sec. 1563.

Sold as the court may direct: Sec. 1517.

A contract for the purchase of real estate may be sold: Secs. 1565 et seq.

Sale, executor, etc., cannot buy at, or be interested in: Sec. 1576.

§ **1517.** No sale of any property of an estate of a decedent is valid unless made under order of the superior court, except as otherwise provided in this chapter. All sales must be under oath reported to and confirmed by the court before the title to the property sold passes. [Amendment approved April 16, 1880; Amendments 1880, p. 92, In effect April 16, 1880.]

Valid sales, where property is mortgaged: Secs. 1569, 726.

§ **1518.** All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and, upon the hearing, any person interested in the estate may file his written objections, which must be heard and determined. A failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the

order directing the sale. [Amendment approved March 24, 1874; Amendments 1873-4, p. 367. In effect July 1, 1874.]

§ 1519. When it appears to the court that the estate is insolvent, or that it will require a sale of all the property of the estate of every character, to pay the family allowance, expenses of administration, and debts, there need be but one petition filed, but one order of sale made, and but one sale had, except in cases of perishable property, which may be sold as provided in section fifteen hundred and twenty-two. The court, when a petition for the sale of any property for any of the purposes herein named is presented, must inquire fully into the probable amount required to make all such payments, and if there be no more estate than sufficient to pay the same, may require but one proceeding for the sale of the entire estate. In such case the petition must set forth substantially the facts required by section fifteen hundred and thirty-seven. [Amendment approved April 16, 1880; Amendments 1880, p. 92. In effect April 16, 1880.]

Orders, generally, in probate matters: Sec. 1704.

One petition, for realty, sale of personalty on: Sec. 1536, 1639.

ARTICLE II.

SALES OF PERSONAL PROPERTY.

§ 1522. Perishable and depreciating property to be sold.
§ 1523. Order to sell personal property.
§ 1524. Partnership interests and choses in action, how sold.
§ 1525. Order of sale, what to direct and what to be first sold.
§ 1526. Sale of personal property.

§ 1522. At any time after receiving letters, the executor, administrator, or special administrator may apply to the court or judge and obtain an or-

der to sell perishable and other personal property likely to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator, or special administrator is responsible for the property, unless, after making a sworn return and on a proper showing, the court shall approve the sale.

Petition: Sec. 1518.
Order for the sale: Sec. 1525.

§ **1523.** If claims against the estate have been allowed, and a sale of property is necessary for their payment, or for the expenses of administration, or for the payment of legacies, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application from time to time, so long as any personal property remains in his hands, and sale thereof is necessary. If it appear for the best interests of the estate, he may, at any time after filing the inventory, in like manner, and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate, whether necessary to pay debts or not. [Amendment approved April 16, 1880; Amendments 1880, p. 93. In effect April 16, 1880.]

Notice by advertising: See sec. 1705.

§ **1524.** Partnership interest or interests belonging to any estate by virtue of any partner-

ship formerly existing, interests in personal property pledged, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner, if in the county and able to be present in court.

Partnership interest: Sec. 1585.

§ **1525.** If it appears that a sale is necessary for the payment of debts or the family allowance, or for the best interest of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court or judge must order it to be made. In making orders and sales for the payment of debts or family allowance, such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold, and the court or judge must so direct. [Amendment approced March 24, 1874; Amendments 1873-4, p 368. In effect July 1, 1874.]

§ **1526.** The sale of personal property must be made at public auction for such money or currency as the court may direct, and after public notice given for at least ten days by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of the sale, and a brief description of the property to be sold, unless for good reason shown the court, or a judge thereof, orders a private sale or a shorter notice. Public sales of such property must be made at the court-house door, or at the residence of the decedent, or at some

other public place; but no sale shall be made of any personal property which is not present at the time of sale, unless the court otherwise order. [Amendment approved April 16, 1880; Amendments 1880, p. 93. In effect April 16, 1880.]

ARTICLE III.

SUMMARY SALES OF MINES AND MINING INTERESTS.

§ 1529. Mines may be sold, how.
§ 1530. Petition for sale, who may file and what to contain.
§ 1531. Order to show cause, how made and on what notice.
§ 1532. Order of sale, when and how made.
§ 1533. Further proceedings to conform to articles two and four.

§ 1529. When it appears from the inventory of the estate of any decedent that his estate consists in whole or in part of mines, or interests in mines, such mines or interests may be sold under the order of the court having jurisdiction of the estate, as hereinafter provided. [Amendment approved April 16, 1880; Amendments 1880, p. 93. In effect April 16, 1880.]

§ 1530. The executor or administrator, or any heir at law, or creditor of the estate, or any partner or member of any mining company, in which interests or shares are held or owned by the estate, may file in the court a petition, in writing, setting forth the general facts of the estate being then in due course of administration, and particularly describing the mine, interest, or shares which it is desired to sell, and particularly the condition and situation of the mines or mining interests, or of the mining company in which such interests or shares are held, and the grounds upon which the sale is asked to be made. [Amendment

approved April 16, 1880; Amendments 1880, p. 93. In effect April 16, 1880.]

Petition for sale, generally: Sec. 1518.

§ 1531. Upon the presentation of such petition, the court, or a judge thereof, must make an order directing all persons interested to appear before such court, at a time and place specified, not less than four or more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executr or administrator to sell such mine, mining interests, shares, or stocks, as are set forth in the petition and belonging to the estate. A copy of the order to show cause must be personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, or published at least four successive weeks in such newspaper as such court or judge shall specify. If all persons interested in the estate signify in writing their assent to such sale, the notice may be dispensed with. [Amendment approved April 16, 1880; Amendments 1880, p. 93. In effect April 16, 1880.]

Publication of notice: Sec. 1705.

§ 1532. If, upon hearing the petition, it appears to the satisfaction of the court that it is to the interest of the estate that such mining property or interests of the estate should be sold, or that an immediate sale is necessary in order to secure the just rights or interests of the mining partners, or tenants in common, such court must make an order authorizing the executor or administrator to sell such mining interests, mines, or shares, as hereinafter provided. [Amendments approved April 16, 1880; Amendments 1880, p. 94. In effect April 16, 1880.]

§ 1533. After the order of sale is made, all

further proceedings for the sale of such mining property, and for the notice, report, and confirmation thereof, must be in conformity with the provisions of article four of this chapter.

ARTICLE IV.

THE SALE OF REAL ESTATE, INTERESTS THEREIN, AND CONFIRMATION THEREOF.

§ 1536. To sell real estate, when.
§ 1537. Verified petition for sale, what to contain and to what it may refer.
§ 1538. Order to persons interested to appear.
§ 1539. Copy to be served, assent given, or publication made.
§ 1540. Hearing after proof of service. Presentation of claims.
§ 1541. Administrator, executor, and witnesses may be examined.
§ 1542. To sell real estate or any part, when.
§ 1543. Order of sale, when to be made.
§ 1544. What the order of sale must contain. May be at public or private sale.
§ 1545. Interested persons may apply for order of sale. Form of petition.
§ 1546. To deliver copy of order to executor.
§ 1547. Notice of sale.
§ 1548. Time and place.
§ 1549. Private sale of real estate, how made, and notice. Bids, when and how received.
§ 1550. Ninety per cent of appraised value must be offered.
§ 1551. Purchase money on sale on credit, how secured.
§ 1552. Hearing and setting aside sale, and when resale may be ordered.
§ 1553. May file objections, when and who.
§ 1554. When order of confirmation is to be made and when not.
§ 1555. Conveyances.
§ 1556. Order of confirmation, what to state.
§ 1557. Sale may be postponed.
§ 1558. Notice of postponement.
§ 1559. Sale of real estate to pay legacies.
§ 1560. Where payment of debts, etc., provided for by will.
§ 1561. Sale without order. May require security.
§ 1562. Where provision by will insufficient.

§ 1563. Estate subject to debts, etc.
§ 1564. Contribution among legatees.
§ 1565. Contract for purchase of lands may be sold, how.
§ 1566. Conditions of sale.
§ 1567. Purchaser to give bond.
§ 1568. Executor to assign contract.
§ 1569. Sales by executors or administrators of lands under mortgage or lien.
§ 1570. The holder of the mortgage or lien may purchase the lands. His receipt to the amount of his claim a valid payment.
§ 1571. Administrator and executor liable for misconduct in sale.
§ 1572. Fraudulent sales.
§ 1573. Limitation of actions for vacating sale, etc.
§ 1574. To what cases preceding section not to apply.
§ 1575. Account of sale to be returned.
§ 1573. Executor, etc, not to be purchaser.

§ 1536. When a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration or legacies, or when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate, and those interested therein that the real estate, or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate upon the order of the court; and an application for the sale of real property may also embrace the sale of personal property. [Amendment approved March 23, 1893; Stats. 1893, p. 212.]

Sale of realty, authorized: Sec. 1516; interest under contracts may be included, sec. 1565; additional bond on, sec. 1389.

§ 1537. To obtain such order for the sale of real property, he must present a verified petition to the superior court, or a judge thereof, setting forth the amount of the personal estate that has

come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance or that will be due after the same has been in force for one year; the debts, expenses, and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which the decedent died seised, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof, and whether the same be community or separate property; the names of the legatees and devisees, if any, and the heirs of the deceased, so far as known to the petitioner; and if said order of sale of real estate is petitioned for on the ground that it is for the advantage, benefit, and best interests of the estate and those interested therein that a sale be made, the petition, in addition to the foregoing facts, must set forth in what way an advantage or benefit would accrue to the estate and those interested therein by such sale. If any of the matters herein enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth facts hereinbefore enumerated will not invalidate the subsequent proceedings if the defect be supplied by the proofs at the hearing and the general facts showing that such sale is necessary or that such sale is for the advantage, benefit, and best interests of the estate and those interested therein be stated in the decree. [Amendment approved March 23, 1893; Stats. 1893, p. 212.]

Petition: Sec. 1518. If executor omits to apply, any other person may: Sec. 1545.

Jurisdictional facts, presumption as to jurisdiction: Sec. 98; stating facts in order: Sec. 1704.

Return of sale: Sec. 1517.
Summary sale of mine: Sec. 1530, ante.

§ **1538.** If it appears to the court or judge, from such petition, that it is necessary, or that it would be for the advantage, benefit, and best interests of the estate and those interested therein, to sell the whole or some portion of the real estate for the purposes and reasons mentioned in the preceding section or any of them, such petition must be filed, and an order thereupon made directing all persons interested in the estate to appear before the court, at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator for the sale of such estate. [Amendment approved March 23, 1893; Stats. 1893, p. 213.]

§ **1539.** A copy of the order to show cause must be personally served on all persons interested in the estate, any general guardian of a minor so interested, and any legatee, or devisee, or heir of the decedent, provided they are residents of the county, at least ten days before the time appointed for hearing the petition, or be published four successive weeks in such newspaper in the county as the court or judge shall direct. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with, and the hearing may be had at any time. [Amendment approved March 24, 1874; Amendments 1873-4, p. 370. In effect July 1, 1874.]

Notice, personal service of, see secs. 1011, 1707-1709; 1710; publication of, sec. 1705.

Guardian when infant a party: Secs. 372, 373, 1722, 1769.

§ 1540. The court, at the time and place appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of personal service or publication of a copy of the order, by affidavit or otherwise, if the consent in writing to such sale of all parties interested is not filed, must proceed to hear the petition, and hear and examine the allegations and proofs of the petitioners, and of all persons interested in the estate who may oppose the application. All claims against the decedent not before presented, if the period of presentation has not elapsed, may be presented and passed upon at the hearing. [Amendment approved April 16, 1880; Amendments 1880, p. 95. In effect April 16. 1880.]

§ 1541. The executor, administrator, and witnesses may be examined on oath by either party, and process to compel them to attend and testify may be issued by the court or judge, in the same manner and with like effect as in other cases. [Amendment approved April 16, 1880; Amendments 1880, p. 95. In effect April 16, 1880.]

Procuring attendance, etc: Sec. 1985, et seq.

§ 1542. If it appears to the satisfaction of the court, or a judge thereof, that it is necessary, or that it is for the advantage, benefit, and best interests of the estate and those interested therein, to sell a part of the real estate, and that by a sale thereof the residue of the estate, real and personal, or some specific part thereof, would be greatly injured or diminished in value, or subjected to expenses, or rendered unprofitable, or that after any such sale the residue would be so small in quantity or value, or would be of such a character with reference to its future disposition among their heirs or devisee, as clearly to render it to the best interests of all concerned that the same

should be sold, the court may authorize the sale of the whole estate or any part thereof, as in the judgment of the court is necessary, or for the advantage, benefit, and best interests of the estate and those interested therein. [Amendment approved March 23, 1893; Stats. 1893, p. 213.]

§ 1543. If it appears to the satisfaction of the court, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary for any of the causes mentioned in this article, or that a sale of the whole or some portion of the real estate is for the advantage, benefit, and best interests of the estate and those interested therein, or if such sale be assented to by all the persons interested, an order must be made to sell the whole, or so much and such parts of the real estate described in the petition as the court shall judge necessary, or for the advantage, benefit, and best interests of the estate and those interested therein. [Amendment approved March 23, 1893; Stats. 1893, p. 213.]

Order, need not recite facts: Sec. 1704.

Personal estate: See, as to ordering a sale of personalty on application for sale of realty, sec. 1639.

§ 1544. The order of sale must describe the lands to be sold and the terms of sale, which may be for cash, or on a credit not exceeding one year, payable in gross or in installments, and in such kind of money, with interest, as the court may direct. The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court otherwise specially directs. If it appears that any part of such real estate has been devised, and not charged in such devise with the payment

of debts or legacies, the court must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale. The court may, if the same is asked for in the petition, order or direct such real estate, or any part thereof, to be sold at either public or private sale, as the executor or administrator shall judge to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order, and as directed therein, he may be compelled to sell, by order of the court, made on motion, after due notice, by any party interested.

Contents of order: Sec. 1704.

§ **1545.** If the executor or administrator neglects or refuses to apply for an order of sale when it is necessary, or when it is for the advantage, benefit, and best interests of the estate and those interested therein that the real estate or some portion thereof be sold, any person interested may make application therefor in the same manner as the executor or administrator, and notice thereof must be given to the executor or administrator before the hearing. The petition of such applicant must contain as many of the matters set forth in section one thousand five hundred and thirty-seven as he can ascertain, and the decree of sale must fix the period of time within which the executor or administrator must make the sale. [Amendment approved March 23, 1893: Stats. 1893, p. 214.]

§ **1546.** [Repealed March 24, 1874; Amendments 1873-4, p. 371; took effect July 1, 1874.]

§ **1547.** When a sale is ordered, and is to be

made at public auction, notice of the time and place of sale must be posted in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court may direct, for three weeks successively next before the sale; the lands and tenements to be sold must be described with common certainty in the notice.

§ 1548. Sales at public auction must be made in the county where the land is situated, but when the land is situated in two or more counties it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day, and must be made on the day named in the notice of sale, unless the same is postponed.

Postponement of sale: Secs. 1557, 1558.

§ 1549. When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county; if none, then in such paper as the court or a judge thereof may direct, for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice; and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator per-

sonally, or may be filed in the office of the clerk of the court to which the return of sale must be made, at any time after the first publication of the notice and before the making of the sale. If it be shown that it will be for the best interest of the estate, the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen, but not less than eight days from the first publication of the notice, in which case the notice of sale, and the sale, may be made to correspond with such order. [Amendment approved April 16, 1880; Amendments 1880, p. 95. In effect April 16, 1880.]

§ 1550. No sale of real estate at private sale shall be confirmed by the court, unless the sum offered is at least ninety per cent, of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed, and they must make an appraisement thereof in the same manner as in case of an original appraisement of an estate. This may be done at any time before the sale or the confirmation thereof.

§ 1551. The executor or administrator must, when the sale is made upon a credit, take the notes of the purchaser for the purchase-money, with a mortgage on the property to secure their payment.

§ 1552. The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the court, which must be filed in the office of the clerk at any time subsequent to the sale. A hearing upon the return

of the proceedings may be asked for in the return or by petition subsequently, and thereupon the clerk must fix the day for the hearing, of which notice of at least ten days must be given by the clerk by notices posted in three public places in the county or by publication in a newspaper, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing, the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair or the sum bid disproportionate to the value, and if it appears that a sum exceeding such bid at least ten per cent exclusive of a new sale may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. If an offer of ten per cent more in amount than that named in the return be made to the court, in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale. [Amendment approved March 23, 1891; Stats. 1891, p. 427.]

Sales under will: Sec. 1561.

Notice of petition for confirmation of sale, description of property by reference in: Sec. 1712.

Attorney, court may appoint, to represent party: Sec. 1718.

§ 1553. When return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon, when the return is heard by the court or judge, and may produce witnesses in support of his objections.

§ 1554. If it appears to the court that the sale was legally made and fairly conducted, and that

the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in section fifteen hundred and fifty-two be made and accepted by the court, the court must make an order confirming the sale, and directing conveyances to be executed. The sale, from that time, is confirmed and valid, and a certified copy of the order confirming it and directing conveyances to be executed, must be recorded in the office of the recorder of the county in which the land sold is situated. If, after the confirmation, the purchased neglects or refuses to comply with the terms of sale, the court may, on motion of the executor or administrator, and after notice to the purchaser, order a resale to be made of the property. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate.

Proof of notice before sale and recital in: Sec. 1556; recording certified copy, sec. 1719.

§ 1555. Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county recorder, either by the date of such recording, or by the date, volume, and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest, and estate of the decedent in the premises, at the time of his death; if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest in the premises, other than or in addition to that of the

decedent at the time of his death, such right, title, or interest, also passes by such conveyances. [Amendment approved April 16, 1880; Amendments 1880, p. 96. In effect April 16, 1880.]

§ **1556.** Before any order is entered confirming the sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made.

Notice of sale, generally: Secs. 1547, 1549.

§ **1557.** If, at the time appointed for the sale, the executor or administrator deems it for the interest of all persons concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months.

§ **1558.** In case of a postponement, notice thereof must be given, by a public declaration, at the time and place first appointed for the sale, and if the postponement be for more than one day, further notice must be given, by posting notices in three or more public places in the county where the land is situated, or publishing the same, or both, as the time and circumstances will admit.

Publishing notice: Sec. 1705.

§ **1559.** [Repealed March 24, 1874; Amendments 1873-4, p. 371; took effect July 1, 1874.]

§ **1560.** If the testator makes provision by his will, or designates the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they must be paid according to such provision or designation, out of the estate thus appropriated, so far as the same is sufficient.

Insufficient provision, in will, effect of: Sec.

Payment of debts and expenses, generally: Sec. 1516.

Order of appropriation: Civil Code, sec. 1359.

§ 1561. When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales, as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale be confirmed by the court. [Amendment approved April 16, 1880; Amendments 1880, p. 95. In effect April 16, 1880.]

§ 1562. If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration, and family expenses, that portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this chapter.

§ 1563. The estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devises or legacies; but specific devises or legacies are exempt from such liability, if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate.

Real and personal property, alike chargeable: Sec. 1516.

§ 1564. When an estate given by will has been sold for the payment of debts or expenses, all

the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the court, when distribution is made, must, by decree for that purpose, settle the amount of the several liabilities, and decree the amount each person shall contribute, and reserve the same from their distributive shares, respectively, for the purpose of paying such contribution. [Amendment approved April 16, 1880; Amendments 1880, p. 97. In effect April 16, 1880.]

§ **1565.** If a decedent, at the time of his death, was possessed of a contract for the purchase of lands, his interest in such land and under such contracts may be sold on the application of his executor or administrator, in the same manner as if he had died seised of such land; and the same proceedings may be had for that purpose as are prescribed in this chapter for the sale of lands of which he died seised, except as hereinafter provided.

§ **1566.** The sale must be made subject to all payments that may thereafter become due on such contracts, and if there are any such, the sale must not be confirmed by the court until the purchasers execute a bond to the executor or administrator for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the court or judge shall approve. [Amendment approved April 16, 1880; Amendments 1880, p. 97. In effect April 16, 1880.]

§ **1567.** The bond must be conditioned that the purchaser will make all payments for such land that become due after the date of the sale, and

will fully indemnify the executor or administrator and the persons so entitled, against all demands, costs, charges, and expenses, by reason of any covenant or agreement contained in such contract.

§ **1568.** Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract, which vests in the purchaser, his heirs and assigns, all the right, title, and interest of the estate, or of the persons entitled to the interest of the decedent, in the lands sold at the time of the sale; and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have had if he were living.

§ **1569.** When any sale is made by an executor or administrator, pursuant to provisions of this chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first, to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay; and the land is subject to such mortgage or lien until the purchase money has been actually so applied. No claim against any estate, which has been presented and allowed, is affected by the statute of limitations, pending the proceedings for the settlement of the estate. The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the court, to be received by the clerk thereof, whereupon the mortgage or lien upon the land must

cease and the purchase money must be paid over by the clerk of the court without delay, in payment of the expenses of the sale, and in satisfaction of the debt to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the court otherwise directs. [Amendment approved April 16, 1880; Amendments 1880, p. 97. In effect April 16, 1880.]

Valid claim, against estate of decedent: See secs. 1493, 1497, 1500.

Paid into court: See secs. 572-74, 2104.

§ 1570. At any sale, under order of the court, of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the court, or the clerk thereof, an amount sufficient to pay such expenses. [Amendment approved April 16, 1880; Amendments 1880, p. 97. In effect April 16, 1880.]

§ 1571. If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise.

Bond of executor, etc.: Sec. 1388.

§ 1572. Any executor or administrator who fraudulently sells any real estate of a decedent contrary to or otherwise than under the provisions of this chapter, is liable in double the value

of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein.

Prohibited connection with sale: Sec. 1576.

§ 1573. No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud, or other grounds upon which the action is based. [Amendment approved April 16, 1880; Amendments 1880, p. 112. In effect April 16, 1880.]

Persons under disability, provision inapplicable to: See sec. 1574.

Discovery of the fraud, within three years of: See sec. 338, subd. 4.

§ 1574. The preceding section shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability.

§ 1575. When a sale has been made by an executor or administrator of any property of the estate, real or personal, he must return to the court, within thirty days thereafter, an account of sales, verified by his affidavit, or in case of his absence from the county, or other inability, by the affidavit of his attorney. If he neglects to make such return, he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause

why such attachment should not issue, or such revocation should not be made. [Approved March 3, 1897; Stats. 1897, ch. 66. In effect immediately.]

Attachment for contempt: Sec. 1212 et seq.

Notice by citation: Sec. 1710; also, secs. 1707-1709.

§ 1576. No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale.

Purchase by administrator, etc., forbidden: Sec. 1617.

ARTICLE V.

[New article added March 15, 1887, Stats. 1887. p. 115.]

MORTGAGES AND LEASES OF REAL ESTATE.

§ 1577. Mortgage of real property of decedent.
§ 1578. Proceedings to obtain order.
§ 1579. To obtain lease of realty.

§ 1577. Whenever in any estate now being administered or that may hereafter be administered it shall appear to the Superior Court, or a judge thereof, to be for the advantage of the estate to raise money upon a note or notes, to be secured by a mortgage of the real property of any decedent, or of a minor, or an incompetent person, or any part thereof, or to make a lease of said realty or any part thereof, the court or judge, as often as occasion therefor shall arise in the administration of any estate, may, on a petition, notice, and hearing as provided in this article, authorize, empower, and direct the executor or administrator or or guardian of such minor or incompetent person to mortgage such real estate or any part thereof, and to execute a note or notes to be secured by

such mortgage, or to lease such real estate or any part thereof. [Amendment approved March 3, 1893; Stats. 1893, p. 72; in effect immediately.]

This section was also amended 1891 (Stats. 1891, p. 247.)

§ 1578. To obtain an order to mortgage such realty, the proceedings to be taken and the effect thereof shall be as follows:

First. The executor or administrator of any estate, or guardian of any minor or incompetent person, or any person interested in the estates of such decedents, minors, or incompetent persons, may file a verified petition showing:

1. The particular purpose or purposes for which it is proposed to make the note or notes and mortgage, which shall be either to pay the debts, legacies, or charges of administration, or to pay, reduce, extend, or renew some lien or mortgage already subsisting in said realty or some part thereof.

2. A statement of the debts, legacies, charges of administration, liens or mortgages to be paid, reduced, extended, or renewed, as the case may be.

3. The advantage that may accrue to the estate from raising the required money by note or notes and mortgage or providing for the payment, reduction, extension, or renewal of the subsisting liens or mortgages, as the case may be.

4. The amount to be raised, with a general description of the property proposed to be mortgaged; and,

5. The names of the legatees and devisees, if any, and of the heirs of the deceased, or of the minor, or of the incompetent person, as the case may be, so far as known to the petitioner.

Second. Upon filing such petition, an order shall be made by the court or judge, requiring all

persons interested in the estate to appear before the court or judge, at a time and place specified, not less than four nor more than ten weeks thereafter, then and there to show cause why the realty (briefly indicating it), or some part thereof, should not be mortgaged for the amount mentioned in the petition (stating such amount), or such lesser amount as to the court or judge shall seem meet, and referring to the petition on file for further particulars.

Third. The order to show cause may be personally served on the persons interested in the estate, at least ten days before the time appointed for hearing the petition, or may be published for four successive weeks in a newspaper of general circulation, published in the county.

Fourth. At the time and at the place appointed in the order to show cause, or at such other time and place to which the hearing may be postponed (the power to make all needful postponements being hereby vested in the court or judge), having first received satisfactory proof of personal service or publication of the order to show cause, the court or judge must proceed to hear the petition and any objections that may be filed or presented thereto. Upon such hearing, witnesses may be compelled to attend and testify, in the same manner, and with like effect, as in other cases; and if, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to mortgage the whole or any portion of the real estate, an order must be made authorizing, empowering, and directing the executor or administrator, or the guardian of such minor or incompetent person, to make such mortgage, and a promissory note or notes to the lender, for the amount of the loan, to be secured by said mortgage; the order may direct that a lesser amount than that named in the petition be borrowed, and may pre-

scribe the maximum rate of interest and period of the loan, and may direct in what coin or currency it shall be paid, and require that the interest and the whole or any part of the principal be paid, from time to time, out of the whole estate or any part thereof, and that any buildings on the premises to be mortgaged shall be insured for further security of the lender, and the premiums paid from such income.

Fifth. After the making of the order to mortgage, the executor, administrator, or guardian of a minor or of an incompetent person shall execute and deliver a promissory note or notes for the amount and period specified in the order, and shall execute, acknowledge, and deliver a mortgage of the premises, setting forth in the mortgage that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county recorder of every county in which the encumbered land, or any portion thereof, lies. The note or notes and mortgage shall be signed by the executor, administrator, or guardian as such, and shall create no personal liability against the person so signing.

Sixth. Every note or notes and mortgage so made shall be effectual to mortgage and hypothecate all the right, title, interest, and estate which the decedent, minor, or incompetent person had in the premises described therein at the time of the death of such decedent, or at the time of the appointment of the guardian of such minor or of such incompetent person, or prior thereto, and any right, title, or interest in said premises acquired by the estate of such decedent, minor, or incompetent person, by operation of law or otherwise, since the time of the death of such decedent, or the appointment of the guardian of such minor or incompetent person. Jurisdiction of the court to administer the estate of such decedent, minor,

or incompetent person shall be effectual to vest such court and judge with jurisdiction to make the order for the note or notes and mortgage, and such jurisdiction shall conclusively inure to the benefit of the mortgagee named in the mortgage, his heirs and assigns. No irregularity in the proceedings shall impair or invalidate the same or the note or notes and mortgage given in the pursuance thereof, and the mortgagee, his heirs and assigns, shall have and possess the same rights and remedies on the note or notes and mortgage as if it had been made by the decedent prior to his death, the minor after reaching the age of maturity, or the incompetent person when legally competent; provided, however, that upon any foreclosure, if the proceeds of the encumbered property are insufficient to pay the note or notes, and mortgage, no judgment or claim for any deficiency of such proceeds to satisfy the note or notes and mortgage, or the costs or expenses of sale, shall be had or allowed, except in cases where the note or notes and mortgage were given to pay, reduce, extend, or renew a lien or mortgage subsisting on the realty, or some part thereof, at the time of the death of the decedent, and the indebtedness secured by such lien or mortgage was an allowed and approved claim against his estate, or a lien upon the interest of the minor in said real estate at the time it vested in him, or upon the estate of the incompetent at the time the incompetency of the incompetent person was so declared by the court; and provided also, that in cases affecting the estate of the deceased persons, the part of the indebtedness remaining unsatisfied must be classed and paid with other demands against the estate, as provided in article three, chapter ten, of title eleven, part three, of this code, with respect to mortgages subsisting at the time of death. [Amendment approved March 3, 1893; Stats. 1893, p. 72; in effect immediately.]

This section was also amended in 1887; Stats. 1887, p. 115; and in 1891, Stats. 1891, p. 247.

§ 1579. To obtain an order to lease the realty, the proceedings to be taken and the effect thereof shall be as follows:

First. The executor, administrator, guardian of a minor or of an incompetent person, or any person interested in the estates of such decedents, minors, or incompetent persons, may file a verified petition showing:

1. The advantage or advantages that may accrue to the estate from giving a lease.

2. A general description of the property proposed to be leased.

3. The term, rental, and general conditions of the proposed lease.

4. The names of the legatees and devisees, if any, and of the heirs of the deceased, or of the minor, or of the incompetent person, so far as known to the petitioner.

Second. Upon filing such petition an order shall be made by the court or judge requiring all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than two nor more than four weeks thereafter, then and there to show cause why the realty (briefly indicating it) should not be leased for the period (stating it), at the rental mentioned in the petition (stating it), and referring to the petition on file for further particulars.

Third. The order to show cause may be personally served on the persons interested in the estate at least ten days before the time appointed for hearing the petition, or it may be published for two successive weeks in a newspaper of general circulation in the county.

Fourth. At the time and place appointed to show cause, or at such other time and place to which the hearing may be postponed (the power

to make all needful postponements being hereby vested in the court or judge), the court or judge having first received satisfactory proof of personal service or publication of the order to show cause, must proceed to hear the petition, and any objections that may have been filed or presented thereto. Upon such hearing, witnesses may be compelled to attend and testify in the same manner and with like effect as in other cases, and the court may, in its discretion, appoint one or more, not exceeding three, disinterested persons to appraise the rental value of the premises, and direct that a reasonable compensation for the services, not exceeding five dollars per day, be paid by the estate. If, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to lease the whole or any portion of the real estate, an order must be made authorizing, empowering, and directing the executor, administrator, or the guardian to make such lease. The order may prescribe the minimum rental to be received for the premises, and the period of the lease, which must in no case be longer than for five years, and may prescribe the other terms and conditions of such lease.

Fifth. After the making of the order to lease, the executor, administrator, or guardian of a minor or of an incompetent person shall execute, acknowledge, and deliver a lease of the premises for the term and period and with the conditions specified in the order, setting forth in the lease that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county recorder of every county in which the leased land or any portion thereof lies.

Sixth. Every lease so made shall be effectual to demise and let, at the rent, for the term, and upon the conditions therein prescribed, the prem-

ises described therein. Jurisdiction of the court to administer the estate of the decedent, the minor, or of the incompetent person shall be effectual to vest such court and judge with jurisdiction to make the order for the lease, and such jurisdiction shall conclusively inure to the benefit of the lessee, his heirs and assigns. No omission, error, or irregularity in the proceedings shall impair or invalidate the same, or the lease made in pursuance thereof. [Amendment approved March 31, 1891; Stats. 1891, p. 249.]

This section was also amended in 1887; Stats. 1887, p. 117.

CHAPTER VIII.

OF THE POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS, AND OF THE MANAGEMENT OF ESTATES.

§ 1581. Executors to take possession of the entire estate.
§ 1582. Executors may sue and be sued for recovery of property.
§ 1583. May maintain actions for waste, conversion, and trespass.
§ 1584. Executor and administrator may be sued for waste or trespass of decedent.
§ 1585. Surviving partner to settle up business. Interest therein to be appraised. Account to be rendered.
§ 1586. Actions on bond of executor or administrator may be brought by another administrator.
§ 1587. What executors are not parties to actions.
§ 1588. May compound.
§ 1589. Recovery of property fraudulently disposed of by testator.
§ 1590. When executor to sue, as provided in preceding section.
§ 1591. Disposition of estate recovered.

§ 1581. The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. For the purpose

of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in this title.

Possession of estate by executor, etc.: Sec. 1452.

Collection of debts, when no liability for failure: Sec. 1615.

Executor or administrator, suits by and against: Secs. 1582-1584, 1585-1587, 1589, 1590.

Heir may maintain ejectment and suit to quiet title during possession of executor, etc.: Secs. 1452, 738.

§ 1582. Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates. [Amendment approved March 26, 1895; Stats. 1895, p. 80. In effect March 26, 1895.]

Executors and administrators—Suits by, after substitution, sec. 385; without joining beneficiaries, sec. 369. Suits against, costs, sec. 1509.

Suggestion of death where action by deceased pending: Sec. 385.

The right to maintain suits for the possession of the real property of the estate: See sec. 1452, ante.

§ 1583. Executors and administrators may maintain actions against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the goods of their testator

or intestate, in his lifetime. They may also maintain actions for trespass committed on the real estate of the decedent in his lifetime.

§ **1584.** Any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person.

§ **1585.** When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator, the court, or a judge thereof, may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained. [Amendment approved April 16, 1880; Amendments 1880, p. 98. In effect April 16, 1880.]

Interest of decedent, in partnership, may be sold: Sec. 1524.

§ **1586.** An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond

of an executor, or of any former administrator of the same estate.

Bond of executor or administrator: Sec. 1388 et seq.

§ 1587. In actions by or against executors, it is not necessary to join those as parties to whom letters were issued, but who have not qualified.

Defendants joined in actions: Secs. 379, 382.

§ 1588. Whenever a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approbation of the court, or a judge thereof, may compound with him and give him a discharge, upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just, and for the best interest of the estate. [Amendment approved April 16, 1880; Amendments 1880, p. 98. In effect April 16, 1880.]

Insolvency: Sec. 1822.

§ 1589. When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate, or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditor all such real estate so fraudulently conveyed, and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights, or credits which have been so conveyed by the decedent in his lifetime, what-

ever may have been the manner of such fraudulent conveyance.

Executor or administrator may sue without joining beneficiaries: Sec. 369.

Power to bring action: Secs. 1452, 1581-1583.

Fraudulent conveyances: See secs. 1590, 1591.

§ **1590.** No executor or administrator is bound to sue for such estate, as mentioned in the preceding section, for the benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator thereof, as the court, or a judge thereof, shall direct. [Amendment approved April 16, 1880; Amendments 1880, p. 98. In effect April 16, 1880.]

§ **1591.** All real estate so recovered must be sold for the payment of debts, in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the court; and the proceeds of all goods, chattels, rights, and credits so recovered must be appropriated in payment of the debts of the decedent in the same manner as other property in the hands of the executor or administrator. [Amendment approved April 16, 1880; Amendments 1880, p. 98. In effect April 16, 1880.]

CHAPTER IX.

OF THE CONVEYANCE OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS IN CERTAIN CASES.

§ 1597. Executor to complete contracts for sale of real estate.
§ 1598. Petition for executor to make conveyance, and notice of hearing.
§ 1599. Interested parties may contest.
§ 1600. Conveyances when ordered to be made.
§ 1601. Execution of conveyance and record thereof, how enforced.
§ 1602. Rights of petitioner to enforce contract.
§ 1603. Effect of conveyance.
§ 1604. Effect of recording a copy of the decree.
§ 1605. Recording decree does not supersede power of court to enforce it.
§ 1606. Where party to whom conveyance to be made is dead.
§ 1607. Decree may direct possession to be surrendered.

§ 1597. When a person who is bound by contract in writing to convey any real estate dies before making the conveyance, and in all cases when such decedent, if living, might be compelled to make such conveyance, the court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto. [Amendment approved April 16, 1880; Amendments 1880, p. 99. In effect April 16, 1880.]

§ 1598. On the presentation of a verified petition by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, the court, or a judge thereof, must appoint a time and place for hearing the petition, and must order notice thereof to be published at least four successive weeks before such hearing, in such newspaper in this State as he may desig-

nate. [Amendment approved April 16, 1880; Amendments 1880, p. 99. In effect April 16, 1880.]

Verification of pleadings: Sec. 446.
Publication of notice: Sec. 1705.
Petition: Sec. 1518.

§ 1599. At the time and place appointed for the hearing, or at such other time to which the same may be postponed, upon satisfactory proof by affidavit or otherwise of the due publication of the notice, the court must proceed to a hearing, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court may examine, on oath, the petitioner and all who may be produced before him for that purpose.

§ 1600. If, after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner must be made, entered on the minutes of the court and recorded.

§ 1601. The executor or administrator must execute the conveyance according to the directions of the decree, a certified copy of which must be recorded with the deed in the office of the recorder of the county where the lands lie, and is prima facie evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance. [Amendment approved March 24, 1874; Amendments 1873-4, p. 371. In effect July 1, 1874.]

§ 1602. If, upon hearing, as hereinbefore provided, the right of the petitioner to have a specific

performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the right of the petitioner, who may, at any time within six months thereafter, proceed by action to enforce a specific performance thereof. [Amendment approved April 16, 1880; Amendments 1880, p. 99. In effect April 16, 1880.]

§ **1603.** Every conveyance made in pursuance of a decree as provided in this chapter, shall pass the title to the estate contracted for, as fully as if the contracting party himself was still living, and executed the conveyance. [Amendment approved April 16, 1880; Amendments 1880, p. 99. In effect April 16, 1880.]

Conveyances by executor, etc.: Sec. 1555.

§ **1604.** A copy of the decree for a conveyance, as provided in this chapter, duly certified and recorded in the office of the recorder of the county where the lands lie, gives the person entitled to the conveyance a right to the possession of the lands contracted for, and to hold the same according to the terms of the intended conveyance, in like manner as if they had been conveyed in pursuance of the decree. [Amendment approved April 16, 1880; Amendments 1880, p. 99. In effect April 16, 1880.]

§ **1605.** The recording of any decree, as provided in the preceding section, shall not prevent the court making the decree from enforcing the same by other process.

§ **1606.** If the person entitled to the conveyance dies before the commencement of proceedings therefor under this chapter, or before the completion of the conveyance, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent, may,

for the benefit of the person so entitled, commence such proceedings or prosecute any already commenced, and the conveyance must be so made as to vest the estate in the persons entitled to it, or in the executor or administrator, for their benefit.

§ 1607. The decree provided for in this chapter may direct the possession of the property therein described to be surrendered to the person entitled thereto, upon his producing the deed and a certified copy of the decree, when, by the terms of the contract, possession is to be surrendered.

CHAPTER X.

ACCOUNTS AND OF PAYMENT OF DEBTS.

ARTICLE I.

LIABILITIES AND COMPENSATION OF EXECUTORS.

§ 1612. When executor or administrator personally liable.
§ 1613. Executor to be charged with all estate, etc.
§ 1614. Not to profit or lose by estate.
§ 1615. Uncollected debts without fault.
§ 1616. Compensation of the executor and administrator.
§ 1617. Not to purchase claims against the estate.
§ 1618. Executor's and administrator's commissions.

§ 1612. No executor or administrator is chargeable upon any special promise to answer damages or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person by him thereunto specially authorized.

Compare sec. 1973, subd. 2.

§ 1613. Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit and income of the estate.

§ 1614. He shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss if the sale has been justly made.

Becoming purchaser: Sec. 1576.

§ 1615. No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault.

§ 1616. He shall be allowed all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in courts, and for his services such fees as provided in this chapter; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless, by a written instrument, filed in the court, he renounces all claim for compensation provided by the will. [Amendment approved April 16, 1880; Amendments 1880, p. 99. In effect April 16, 1880.]

Compensation for services—commissions, where no provision in will, etc.: Sec. 1618.

Costs: Sec. 1509.

§ 1617. No administrator or executor shall purchase any claim against the estate he represents; and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid.

Purchasing property of estate: Sec. 1576; fraudulently selling realty; Sec. 1572.

§ 1618. When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of estate accounted for by him, as follows: for the first thousand dollars, at the rate of seven per cent; for all above that sum, and not exceeding ten thousand dollars, at the rate of five per cent; for all above ten thousand dollars, and not exceeding twenty thousand dollars, at the rate of four per cent; for all above twenty thousand dollars, and not exceeding fifty thousand dollars, at the rate of three per cent; for all above fifty thousand dollars, and not exceeding one hundred thousand dollars, at the rate of two per cent; and for all above one hundred thousand dollars, at the rate of one per cent. The same commissions shall be allowed to administrators. In all cases, such further allowance may be made as the court may deem just and reasonable for any extraordinary service, but the total amount of such extra allowance must not exceed one-half the amount of commissions allowed by this section. Where the property of the estate is distributed in kind, and involves no labor beyond the custody and distribution of the same, the commission shall be computed on all the estate above the value of twenty thousand dollars, at one-half of the rates fixed in this section. Public administrators shall receive the same compensation and allowances as are allowed in this title to other administrators. All contracts between an execu-

tor or administrator and an heir, devisee, or legatee, for a higher compensation than that allowed by this section, shall be void; provided, this act shall not apply to estates now in course of administration, except where, and to the extent that, such estates consist of bonds and other securities, to be distributed without extra expense in administration. [Amendment approved March 4, 1881; Amendments 1881, p. 36. In effect March 4, 1881.]

ARTICLE II.

ACCOUNTING AND SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS.

§ 1622. Exhibit of receipts and disbursements, and claims allowed.
§ 1623. Citation to account at third term.
§ 1624. Petition for citation to render final or other account.
§ 1625. Citation to account on application.
§ 1626. Objections to account, who may file.
§ 1627. Attachment for not obeying citation.
§ 1328. To render accounts at expiration of term.
§ 1629. Executor to account after his authority revoked.
§ 1630. Revoking authority of executor, when.
§ 1631. To produce and file vouchers, which remain in court.
§ 1632. Vouchers for items less than twenty dollars, when accepted.
§ 1633. Day of settlement to be appointed, and notice thereof.
§ 1634. Final settlement, partition and distribution made at same time.
§ 1635. Interested party may file exceptions to account.
§ 1636. All matters may be contested by the heirs. Hearing.
§ 1637. Settlement of accounts to be conclusive, when and when not.
§ 1638. Proof of notice of settlement of accounts.
§ 1639. Sale of personal property.
§ 1640. Moneys invested by order of court.

§ 1622. Six months after his appointment, and at any time when required by the court, either

upon his own motion or upon the application of any person interested in the estate, the executor or administrator must render, for the information of the court, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of its affairs. [Amendment approved April 16, 1880; Amendments 1880, p. 100. In effect April 16, 1880.]

§ 1623. If the executor or administrator fails to render an exhibit for six months after his appointment, the court, or a judge thereof, must cause a citation to be issued requiring him to appear and render it. [Amendment approved April 16, 1880; Amendments 1880, p. 100. In effect April 16, 1880.]

Citation: Secs. 1707, 1711.

§ 1624. Any person interested in the estate may, at any time before the final settlement of accounts, present his petition to the court, or a judge thereof, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit should be made. [Amendment, approved April 16, 1880; Amendments 1880, 100. In effect April 16, 1880.]

§ 1625. If the court, or a judge thereof, is satisfied, either from the oath of the applicant or from any other testimony offered, that the facts alleged are true, and considers the showing of the applicant sufficient, he must direct a citation to be issued to the executor or administrator, requiring him to appear, at some day to be named in the citation, and render an exhibit as prayed for. [Amendment approved April 16, 1880; Amendments 1880, 100. In effect April 16th, 1880.]

§ 1626. When an exhibit is rendered by an executor or administrator, any person interested may appear, and by objections in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled, or mismanaged the estate, his letters must be revoked.

Any person interested. See sec. 1635.

Revocation for misconduct. Sec. 1436 et seq.

§ 1627. If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against him, and such exhibit enforced, or his letters may be revoked, in the discretion of the court.

Contempt: Secs. 1209, 1219.

§ 1628. Within thirty days after the expiration of the time mentioned in the notice to creditors within which claims must be exhibited, every executor or administrator must render a full account and report of his administration. If he fails to present his account, the court or judge must compel the rendering of the account by attachments, and any person interested in the estate may apply for and obtain an attachment; but no attachment must issue unless a citation has been first issued, served, and returned, requiring the executor or administrator to appear and show cause why an attachment should not issue. Every account must exhibit all debts which have been presented and allowed during the period embraced in the account. [Amendment approved March 11, 1876 Amendments 1875-6, 104. In effect 90 days after passage.]

Account of administration—final, secs. 1647, 1652.

Judge may receive at chambers: Sec. 166.

§ 1629. When the authority of an executor or administrator ceases, or is revoked for any reason, he may be cited to account before the court, at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor or administrator. [Amendment approved April 16, 1880; Amendments 1880, 101. In effect April 16, 1880.]

§ 1630. If the executor or administrator resides out of the county, or absconds or conceals himself so that the citation cannot be personally served, and neglects to render an account within thirty days after the time prescribed in this article, or if he neglects to render an account within thirty days after being committed where the attachment has been executed, his letters must be revoked.

§ 1631. In rendering his account, the executor or administrator must produce and file vouchers for all charges, debts, claims, and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching any property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reason cannot be produced on the settlement, the payment may be proved by the oath of any competent witness.

Vouchers—required of claimant, sec. 1494; Lacking, see sec. 1632.

§ 1632. On the settlement of his account he may be allowed any item of expenditure not exceeding twenty dollars, for which no voucher is

produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where, and to whom it was made; but such allowances in the whole must not exceed five hundred dollars against any one estate, and if, upon such settlement of accounts, it appear that debts against the deceased have been paid without the affidavit and allowance prescribed by statute or sections one thousand four hundred and ninety-four, one thousand four hundred and ninety-five, and one thousand four hundred and ninety-six of this Code, and it shall be proven by competent evidence to the satisfaction of the court that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-off, and that the estate is solvent, it shall be the duty of the said court to allow the said sums so paid in the settlement of said accounts. [Amendment approved April 16, 1880; Amendments 1880, 101. In effect April 16, 1880.]

§ **1633.** When any account is rendered for settlement, the clerk of the court must appoint a day for the settlement thereof, and thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. If, upon the final hearing at the time of settlement, the court, or a judge thereof, should deem the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper. [Amendment approved March 31, 1891; Stats. 1891, 428.]

§ **1634.** If the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of settlement must state

those facts, which notice must be given by posting or publication for at least ten days prior to the day of settlement. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had without further notice or proceedings. [Amendment approved March 31, 1891; Stats. 1891, 428.]

§ 1635. On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same.

§ 1636. All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs, for cause shown. The hearing and allegations of the respective parties may be postponed from time to time, when necessary, and the court may appoint one or more referees to examine the accounts, and make report thereon, subject to confirmation; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent.

Referees: Secs. 638-645.

§ 1637. The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually or upon his bond, at any time before final distribution; and in any action brought by any such person, the allowance and settlement of the account is prima facie evidence of its correctness. [Amendment ap-

proved March 24, 1874; Amendments 1873-4, 372. In effect July 1st, 1874.]

Conclusiveness of settlement: See sec. 1390, ante; see sec. 1638.

§ 1638. The account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact.

§ 1639. Whenever it appears to the court on any hearing of an application for the sale of real property, that it would be for the interest of the estate that personal property of the estate, or some part of such property, should be first sold, the court may decree the sale of such personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance. [New section approved March 24, 1874; Amendments 1873-4, 372. In effect July 1, 1874.]

§ 1640. Pending the settlement of any estate, on the petition of any party interested therein, and upon good cause shown therefor, the court may order any moneys in the hands of the executors or administrators to be invested for the benefit of the estate in securities of the United States or of this State. Such order can only be made after publication of notice of the petition in some newspaper, to be designated by the court or a judge thereof. [Amendment approved April 16, 1880; Amendments 1880, 101. In effect April 16, 1880.]

ARTICLE III.

THE PAYMENT OF DEBTS OF THE ESTATE.

§ 1643. Order in which debts to be paid.
§ 1644. Where property insufficient to pay mortgage.
§ 1645. Estate insufficient, a dividend to be paid.
§ 1646. Funeral expenses and expenses of last sickness.
§ 1647. Order for payment of debts and discharge of the executor and administrator.
§ 1648. Provision for disputed and contingent claims.
§ 1649. After decree for payment of debts, executor personally liable to creditors.
§ 1650. Claims not included in order for payment of debts, how disposed of.
§ 1651. Order for payment of legacies and extension of time.
§ 1652. Final account, when to be made.
§ 1653. Neglect to render final account, how treated.

§ **1643.** The debts of the estate, subject to the provisions of section twelve hundred and five, must be paid in the following order:

1. Funeral expenses;
2. The expenses of the last sickness;
3. Debts having preference by the laws of the United States;
4. Judgments rendered against the decedent in his lifetime, and mortgages in the order of their date.
5. All other demands against the estate.

Preferred claims for wages: Sec. 1205.
Family allowance: Secs. 1467, 1646.
Mortgaged real estate: Sec. 1569.

§ 1644. The preference given in the preceding section to a mortgage only extends to the proceeds of the property mortgaged. If the proceeds of such property is insufficient to pay the mortgage, the part remaining unsatisfied must be classed with other demands against the estate.

Proceeds of property mortgaged: Sec. 1569.

§ **1645.** If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid.

§ **1646.** The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses, and expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this article, the payment has been ordered by the court.

§ **1647.** Upon the settlement of the accounts of the executor or administrator, as required in this chapter, the court must make an order for the payment of the debts, as circumstances of the estate require. If there is not sufficient funds in the hands of the executor or administrator, the court must specify in the decree the sum to be paid to each creditor. If the whole property of the estate be exhausted by such payment or distribution, such account must be considered as a final account, and the executor or administrator is entitled to his discharge on producing and filing the necessary vouchers and proofs showing that such payments have been made, and that he has fully complied with the decree of the court. [Amendment approved March 11, 1876; Amendments 1875-6, 104. In effect in ninety days.]

Settlement of accounts: Sec. 1628.

§ **1648.** If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due,

established, or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If any creditor whose claim has been allowed, but is not yet due appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered.

§ **1649.** When a decree is made by the court for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend thereon, and execution may be issued on such decree, as upon a judgment in the court, in favor of each creditor, and the same proceedings may be had under such execution as under execution in other cases. The executor or administrator is liable therefor on his bond to each creditor. [Amendment approved April 16, 1880; Amendments 1880, 101. In effect April 16th, 1880.]

§ **1650.** When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor, whose claim was not included in the order for payment, has any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to the creditors, as prescribed in section fourteen hundred and ninety-one, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he

would have been entitled to, had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent, and did not become absolute ten months before such day.

§ **1651.** If the whole of the debts have been paid by the first distribution, the court must direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled, as provided in the next chapter; but if there be debts remaining unpaid, or if, for other reasons, the estate be not in a proper condition to be closed, the court must give such extension of time as may be reasonable, for a final settlement of the estate.

§ **1652.** At the time designated in the last section, or sooner, if within that time all the property of the estate has been sold, or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator must render a final account, and pray a settlement of his administration.

Settlement of accounts: Sec. 1628.

§ **1653.** If he neglects to render his account, the same proceedings may be had as prescribed in this chapter in regard to the first account to be rendered by him, and all the provisions of this chapter relative to the last-mentioned account, and the notice and settlement thereof, apply to his account presented for final settlement.

Proceedings to enforce account: Secs. 1628-1630.

CHAPTER XI.

OF THE PARTITION, DISTRIBUTION, AND FINAL SETTLEMENT OF ESTATES.

Article I. Partial Distribution Prior to Final Settlement.
II. Distribution on Final Settlement.
III. Distribution and Partition.
IV. Agents for Absent Interested Parties. Discharge of Executor or Administrator.

ARTICLE I.

PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.

§ 1658. Payment of legacies upon giving bonds.
§ 1659. Notice of application for legacies.
§ 1660. Executor or other person may resist application.
§ 1661. Decree prayed for to require bond, which must be given. May order whole or part of share to be delivered. Where partition necessary, how made. Costs.
§ 1662. Order for payment of bond, and suit thereon.
§ 1663. Any heir, devisee or legatee may petition the court for distribution of net proceeds. Order of court.

§ 1658. At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee, or legatee, may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate.

Payment of legacies—order of appropriation for: Civil Code, sec. 1360.

Proportion of the debts—for which legatee, etc., liable: Civil Code, sec. 1377; see Code Civil Proc., sec. 1650.

Jurisdiction to order distribution: Sec. 97, subd. 7.

§ **1659.** Notice of the application must be given to the executor or administrator, personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator.

Notice of settlement of account: Sec. 1633.

§ **1660.** The executor or administrator, or any person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make a similar application for himself.

Any person interested: Sec. 1635.

§ **1661.** If, at the hearing, it appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring:

1. Each heir, legatee, or devisee, obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the court, or a judge thereof, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate to which he is entitled.

2. The executor or administrator to deliver to the heir, legatee, or devisee, the whole portion of the estate to which he may be entitled, or only a part thereof, designating it. If, in the execution of the order, a partition is necessary between two or more of the parties interested, it must be

made in the manner hereinafter prescribed. The costs of these proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally amongst them. [Amendment approved April 16, 1880; Amendments 1880, 102. In effect April 16th, 1880.]

Order—not made if any taxes unpaid: Sec. 1669; recording, sec. 1719.

Partition—manner hereinafter prescribed: Sec. 1675 et seq.

§ **1662.** When any bond has been executed and delivered under the provisions of the preceding section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court for an order requiring the payment, and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. At the hearing, the court, if satisfied of the necessity of such payment, must make an order accordingly, designating the amount and giving a time within which it must be paid. If the money is not paid within the time allowed, an action may be maintained by the executor or administrator on the bond.

§ **1663.** At any time after the lapse of one year from the issuance of letters testamentary, or of administration, any heir, devisee, or legatee may present his or her petition to the court for the distribution of the net proceeds of the share of the said estate to which he or she will be entitled. Notice of the application must be given, as required by section sixteen hundred and fifty-nine. The executor or administrator, or any other person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make a similar application for himself. If at the hear-

ing it appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring:

1. Each heir, legatee, or devisee, obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the court, or a judge thereof, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the amount or portion of the proceeds of the estate which he has received; provided, that where the time for filing or presenting claims has expired, and all claims that have been allowed have been paid, or are secured by mortgage upon real estate sufficient to pay them, and the court is satisfied that no injury can result to the estate, the court may dispense with the bond.

2. The executor or administrator to deliver to the heir, legatee, or devisee the proceeds of the estate to which he may be entitled, or only a part thereof, designating it. If, in the opinion of the court, it be necessary, in order to ascertain the proceeds that any or all of the heirs, legatees or devisees may be entitled, that the interest of any heir, legatee, or devisee in one or more pieces or parcels of property of the estate shall be determined or ascertained, the court may suspend proceedings and direct the petitioner or petitioners to take proceedings under section sixteen hundred and sixty-four of this Code to ascertain the interest the petitioner or petitioners will have under the will in any piece or parcel of property. The order must describe the property in relation to which proceedings are to be taken. Whenever any bond has been executed and delivered, proceedings upon

any such bond may be taken under section sixteen hundred and sixty-two. The cost of these proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally between them. [New section approved March 8, 1889; Stats. 1889, 92. In effect March 8, 1889.]

ARTICLE II.

DISTRIBUTION ON FINAL SETTLEMENT.

§ 1664. Proceedings in the nature of an action to determine heirship.
§ 1665. Distribution of estate, how made and to whom.
§ 1666. What the decree must contain, and is final.
§ 1667. Distribution when decedent was not a resident of this State.
§ 1668. Decree to be made only after notice.
§ 1669. No distribution till taxes on personal property are paid.
§ 1670. Continuation of administration.

§ 1664. In all estates now being administered, or that may hereafter be administered, any person claiming to be heir to the deceased, or entitled to distribution in whole or in any part of such estate, may, at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate, file a petition in the matter of such estate, praying the court to ascertain and declare the rights of all persons to said estate and all interests therein, and to whom distribution thereof should be made. Upon the filing of such petition, the Court shall make an order directing service of notice to all persons interested in said estate to appear and show cause, on a day to be therein named, not less than sixty days nor over four months from the date of the making of such order, in which notice shall be set forth the name of the deceased, the name of the executor or administrator of said estate, the names of all persons who may have appeared claiming any interest in said estate in the course of the admin-

istration of the same, up to the time of the making of said order, and such other persons as the Court may direct, and also a description of the real estate whereof said deceased died seized or possessed, so far as known, described with certainty to a common intent; and requiring all said persons and all persons named or not named, having or claiming any interest in the estate of said deceased, at the time and place in said order specified, to appear and exhibit, as hereinafter provided, their respective claims of heirship, ownership, or interest in said estate, to said Court, which notice shall be served in the same manner as a summons in a civil action; upon proof of which service, by affidavit or otherwise, to the satisfaction of the Court, the Court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership, and interest of all parties in and to the property of said deceased, and such determination shall be final and conclusive in the administration of said estate and the title and ownership of said property. The Court shall enter an order or decree establishing proof of the service of such notice. All persons appearing within the time limited, as aforesaid, shall file their written appearance in person or through their authorized attorney, such attorney filing at the same time written evidence of his authority to so appear, entry of which appearance shall be made in the minutes of the Court and in the register of proceedings of said estate. And the Court shall, after the expiration of the time limited for appearing as aforesaid, enter an order adjudging the default of all persons for not appearing as aforesaid, who shall not have appeared as aforesaid. At any time within twenty days after the date of the order or decree of the Court establishing proof of the service of such notice, any of such persons so appearing may file his complaint in the matter of the estate, setting forth the facts constituting his claim of heirship, owner-

ship, or interest in said estate, with such reasonable particularity as the Court may require, and serve a copy of the same upon each of the parties or attorneys who shall have entered their written appearance as aforesaid, if such parties or such attorneys reside within the county; and in case any of them do not reside within the county, then service of such copy of said complaint shall be made upon the Clerk of said Court for them, and the Clerk shall forthwith mail the same to the address of such party or attorney as may have left with said Clerk his Post Office address. Such parties are allowed twenty days after the service of the complaint, as aforesaid, within which to plead thereto, and thereafter such proceedings shall be had upon such complaint as in this Code provided in case of an ordinary civil action; and the issues of law and of fact arising in the proceeding shall be disposed of in like manner as issues of law and fact are herein provided to be disposed of in civil actions, with a like right to a motion for a new trial and appeal to the Supreme Court; and the provisions in this Code contained regulating the mode of procedure for the trial of civil actions, the motion for a new trial of civil actions, statements on motion for a new trial, bills of exception, and statements on appeal, as also in regard to undertakings on appeal, and the mode of taking and perfecting appeals, and the time within which such appeals shall be taken, shall be applicable thereto: provided, however, that all appeals herein must be taken within sixty days from the date of the entry of the judgment or the order complained of. The party filing the petition as aforesaid, if he file a complaint, and if not, the party first filing such complaint, shall, in all subsequent proceedings, be treated as the plaintiff therein, and all other parties so appearing shall be treated as the defendants in said proceedings, and all such defendants shall set forth in their

respective answers the facts constituting their claim of heirship, ownership, or interest in said estate, with such particularity as the Court may require, and serve a copy thereof on the plaintiff. Evidence in support of all issues may be taken orally or by deposition, in the same manner as provided in civil actions. Notice of the taking of such depositions shall be served only upon the parties or the attorneys of the parties so appearing in said proceeding. The Court shall enter a default of all persons failing to appear, or plead, or prosecute, or defend their rights, as aforesaid; and upon the trial of the issues arising upon the pleadings in such proceeding, the Court shall determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein, and persons entitled to distribution thereof, and the final determination of the Court thereupon shall be final and conclusive in the distribution of said estate, and in regard to the title to all the property of the estate of said deceased. The cost of the proceedings under this section shall be apportioned in the discretion of the Court. In any proceeding under this section, the Court may appoint an attorney for any minor mentioned in said proceedings not having a guardian. Nothing in this section contained shall be construed to exclude the right upon final distribution of any estate to contest the question of heirship, title, or interest in the estate so distributed, where the same shall not have been determined under the provisions of this section; but where such questions shall have been litigated under the provisions of this section, the determination thereof, as herein provided shall be conclusive in the distribution of said estate. [New section approved March 16, 1885; Stats. 1885, 209.]

§ 1665. Upon the final settlement of the accounts of the executor or administrator, or at any

subsequent time, upon the application of the executor or administrator, or of any heir, legatee, or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child, and the issue of other children, and any of them, before the close of the administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed to the other heir at law. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final accounts, must be reported and filed at the time of making such distribution; and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by th court, and included in the order or decree, or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts.

Notice of settlement, of account: Sec. 1633.

Absent heirs, attorney for: Sec. 1718; distribution of property of: Sec. 1693.

§ **1666.** In the order or decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.

Recording: Sec. 1719; taxes payable before: Sec. 1669.

Subsequent issue of letters—on discovery of estate: Sec. 1698.

Decree of distribution where will annulled: See sec. 1327, ante.

§ 1667. Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a nonresident of this State, leaving a will which has been duly proved or allowed in the State of his residence, and an authenticated copy thereof has been admitted to probate in this State, and it is necessary, in order that the estate, or any part thereof, may be distributed according to the will, that the estate in this State should be delivered to the executor or administrator in the State or place of his residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court, is a full discharge of the executor or administrator with the will annexed, in this State, in relation to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate, ordered by virtue of this section, must be made in the same manner as other sales of real estate of decedents by order of the court. [Amendment, approved April 16, 1880; Amendments 1880, 102. In effect April 16, 1880.]

Sales of real estate: Sec. 1536 et seq.

§ 1668. The order or decree may be made on the petition of the executor or administrator, or of any person interested in the estate. When such petition is filed the clerk of the court must set the petition for hearing by the court and give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator,

and the time appointed for the hearing of the petition. If, upon the hearing of the petition, the court, or a judge thereof, should deem the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper. If partition be applied for, as provided in this chapter, the decree of distribution shall not divest the court of jurisdiction to order partition, unless the estate is finally closed. [Amendment approved March 3, 1893; Stats. 1893, 71.]

§ 1669. Before any decree of distribution of an estate is made, the court must be satisfied, by the oath of the executor or administrator, or otherwise, that all State, county, and municipal taxes, legally levied upon personal property of the estate, have been fully paid. [Amendment approved April 16, 1880; amendments 1880, 102. In effect April 16th, 1880.]

Similar provision: Political Code, sec. 3752.

Taxes, etc.—The probate judge must require every administrator and executor to pay out of the funds of the estate all taxes due from such estate; and no order or decree for the distribution of any property of any decedent among the heirs or devisees must be made until all taxes against the estate are paid: Polit. Code, sec. 3752.

§ 1670. In all cases where a decedent shall have left a will in and by the terms of which the testator shall have limited the time for administration upon an estate left by him, and the executor and all of the legatees or devisees named in the will shall file and present to the court a petition, in writing, representing that it will be for the best interests of the estate and of the beneficiaries under the will to have the administration upon the estate continued for a longer period of time than that designated in such will, and that it would be injurious to the estate and to such beneficiaries to have the administration brought

to a close at the date therefor designated in the will, the court shall then set a day for the hearing of said petition; and notice thereof shall be served on all persons interested in the estate, in the same manner that smmons in civil actions is served. Upon the day set for such hearing (or upon some other day to which the hearing may have been continued), the court shall proceed to hear proofs touching the representations made in such petition, and any person interested in the estate may also present counter-proofs in opposition to said application; and if, upon such hearing, it be made to appear to the court that the representations made by the petitioners in their said petition contained be true, the court may then, by its order and decree in that behalf, decree and direct that the administration upon the estate continue for and during such further period of time as in its judgment will best subserve the interests of the estate and of the beneficiaries under said will; provided, however, that if, at any time during the period for which the administration upon the estate shall have been thus continued, the executor, or any one or more of the legatees or devisees, shall present to the court his or their petition, representing that it has become necessary for the best interests of the estate and of the beneficiaries under the will to have the administration upon the estate closed, the court shall then set a day for the hearing of said last-named petition; and notice thereof shall be given in the same manner, and the same proceedings be had thereupon, as shall have been given for and had upon the hearing of the petition asking for the continuation of such administration. And if, upon such hearing, it shall be made to appear to the court that the representations made by such petitioners or petitioner (as the case may be) are true, the court shall then, by its order and decree in that behalf, decree and direct that the administration upon the

estate be closed as soon thereafter as, under the circumstances, shall be practicable. [New section added March 31, 1891; Stats. 1891, 423; in effect immediately.]

ARTICLE III.

DISTRIBUTION AND PARTITION.

§ 1675. Estate in common. Commissioners.
§ 1676. Partition and notice thereof, and the time of filing petition.
§ 1677. Estate in different counties, how divided.
§ 1678. Partition may be made, although some of the heirs, etc., have parted with their interest.
§ 1379. Shares to be set out by metes and bounds.
§ 1680. Whole estate may be assigned to one, in certain cases.
§ 1681. Payments for equality of partition, by whom and how.
§ 1682. Estate may be sold.
§ 1683. To give notice to all persons and guardians before partition. Duties of commissioners.
§ 1684. To make report, and partition to be recorded.
§ 1685. When commissioners to make partition are not necessary.
§ 1686. Advancements made to heirs.

§ **1675.** When the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees, or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the court, who must be duly sworn to the faithful discharge of their duties. A certified copy of the order of their appointment, and of the order or decree assigning and distributing the estate must be issued to them as their warrant, and their oath must be indorsed thereon. Upon consent of the parties, or when the court deems it proper and just, it is sufficient to appoint one commissioner

only, who has the same authority and is governed by the same rules as if three were appointed. [Amendment approved April 16, 1880; Amendments 1880, 103. In effect July 16, 1880.]

Attorney appointed by the Court: Sec. 1718.

§ 1676. Such partition may be ordered and had in the Superior Court on the petition of any person interested. But before commissioners are appointed, or partition ordered by the court as directed in this chapter, notice thereof must be given to all persons interested who reside in this State, or to their guardians, and to the agents, attorneys, or guardians, if any in this State, of such as reside out of this State, either personally or by public notice, as the court may direct. The petition may be filed, attorneys, guardians, and agents appointed, and notice given at any time before the order or decree of distribution, but the commissioners must not be appointed until the order or decree is made distributing the estate. [Amendment approved April 16, 1880; Amendments 1880, 103. In effect July 16th, 1880.]

§ 1677. If the real estate is in different counties, the court may, if deemed proper, appoint commissioners for all, or different commissioners for each county. The estate in each county must be divided separately among the heirs, devisees, or legatees, as if there was no other estate to be divided; but the commissioners first appointed must, unless otherwise directed by the court, make division of such real estate wherever situated within this State. [Amendment approved April 16, 1880; Amendments 1880, 103. In effect July 16, 1880.]

§ 1678. Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees, or dev-

isees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees.

§ 1679. When both distribution and partition are made, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided.

§ 1680. When the real estate cannot be divided without prejudice or inconvenience to the owners, the court may assign the whole to one or more of the parties entitled to share therein, who will accept it, always preferring the males to the females, and among children, preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or in case of the minority of such party, then to the satisfaction of his guardian; and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the commissioners, and on making or securing the payment as before provided, the court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests

in the person to whom the same is so assigned. [Amendment approved April 16, 1880; Amendments 1880, 103. In effect July 16th, 1880.]

§ 1681. When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but such partition must not be established by the court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

§ 1682. When it appears to the court, from the commissioners' report, that it cannot otherwise be fairly divided and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported, and confirmed, in the same manner and under the same requirements provided in article four, chapter seven, of this title.

§ 1683. Before any partition is made or any estate divided, as provided in this chapter, notice must be given to all persons interested in the partition, their guardians, agents, or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition. The commissioners may take testimony, order surveys, and take such other steps as may be necessary to enable them to form a judgment upon the matters before them.

§ **1684.** The commissioners must report their proceedings, and the partition agreed upon by them, to the court, in writing, and the court may, for sufficient reasons, set aside the report and commit the same to the same commissioners, or appoint others; and when such report is finally confirmed, a certified copy of the judgment, or decree of partition made thereon, attested by the clerk under the seal of the Court, must be recorded in the office of the recorder of the county where the lands lie. [Amendment approved April 16, 1880; Amendments 1880, 104. In effect July 16, 1880.]

§ **1685.** When the court makes a judgment or decree assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is decreed, or some of them, request that such partition be made. [Amendment approved April 16, 1880; Amendments 1880, 104. In effect July 16, 1880.]

§ **1686.** All questions as to advancements made, or alleged to have been made, by the decedent to his heirs, may be heard and determined by the Court, and must be specified in the decree assigning and distributing the estate; and the final judgment or decree of the Court, or in case of appeal, of the Supreme Court, is binding on all parties interested in the estate. [Amendment approved April 16, 1880; Amendments 1880, 104. In effect July 16th, 1880.]

ARTICLE IV.

AGENTS FOR ABSENT OR INTERESTED PARTIES. DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

§ 1691. Court may appoint agent to take possession for absentees.
§ 1692. Agent to give bond, and his compensation.
§ 1693. Unclaimed estate, how disposed of.
§ 1694. When real and personal property of absentee to be sold.
§ 1695. Liability of agent on his bond.
§ 1696. Certificate to claimant.
§ 1697. Final settlement, decree, discharge.
§ 1698. Discovery of property.

§ **1691.** When any estate is assigned or distributed by a judgment or decree of the court, as provided in this chapter, to any person residing out of, and having no agent in this state, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose and authorize him to take charge of such estate, as well as to act for such absent person in the distribution; provided, that if such estate be in money when so assigned or distributed, the executor or administrator of such estate may deposit the shares of each person, and in the name of said person, as far as known, as designated in said assignment or decree of distribution, with the county treasurer of the county in which said estate is being probated, who shall give a receipt for the same, and be liable upon his official bond therefor; and said receipt shall be deemed and received by the court or judge thereof as a voucher in favor of said executor or administrator, with the same force and effect as if executed by such assignee, legatee, or distributee; and said section as amended shall be applicable to any and all estates now pending in

which a decree of final discharge has not been granted. [Amendment approved March 26, 1895; Stats. 1895, 74. In effect March 26, 1895.]

§ 1692. The agent must execute a bond to the State of California, to be approved by the court, or a judge thereof, conditioned that he shall faithfully manage and account for the estate. The court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses. [Amendment approved April 16, 1880; Amendments 1880, 104. In effect July 16, 1880.]

§ 1693. When personal property remains in the hands of the agent unclaimed for a year, and it appears to the court that it is for the benefit of those interested, it shall be sold under the order of the court, and the proceeds, after deducting the expenses of the sale allowed by the court, must be paid into the State treasury. When the payment is made, the agent must take from the treasury duplicate receipts, one of which he must file in the office of the controller and the other in the court. [Amendment approved April 16, 1880; Amendments 1880, p. 104. In effect July 16, 1880.]

Unclaimed property: See secs. 1269-1272.

§ 1694. The agent must render the court appointing him, annually, an account, showing:

1. The value and character of the property received by him, what portion thereof is still on hand, what sold, and for what;

2. The income derived therefrom;

3. The taxes and assessments imposed thereon, for what, and whether paid or unpaid;

4. Expenses incurred in the care, protection, and management thereof, and whether paid or unpaid. When filed, the court may examine witnesses and take proofs in regard to the account;

and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court may, by order, direct a sale to be made of the whole or such parts of the real or personal property as shall appear to be proper, and the purchase money to be deposited in the State treasury. [Amendment approved, April 16, 1880; Amendments 1880, p. 105. In effect July 16, 1880.]

§ 1695. The agent is liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the sale as required in the preceding sections, and may be sued thereon by any person interested.

§ 1696. When any person appears and claims the money paid into the treasury, the court making the distribution must inquire into such claim, and being first satisfied of his right thereto, must grant him a certificate to that effect, under its seal; and upon the presentation of the certificate to him, the controller must draw his warrant on the treasurer for the amount. [Amendment approved, April 16, 1880; Amendments 1880, p. 105. In effect July 16, 1880.]

§ 1697. When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court must make a judgment or decree discharging him from all liability to be incurred thereafter.

§ 1698. The final settlement of an estate, as in this chapter provided, shall not prevent a subsequent issue of letters testamentary, or of admin-

istration, or of administration with the will annexed, if other property of the estate be discovered, or if it become necessary or proper for any cause that letters should be again issued. [Amendment approved, March 24, 1874; Amendments, 1873-4, p. 373. In effect July 1, 1874.]

ARTICLE V.

[New article added March 19, 1889; Stats. 1889, p. 337.]

ACCOUNTS OF TRUSTEES—DISTRIBUTION.

§ 1699. Superior court not to lose jurisdiction by final jurisdiction.
§ 1700. Compensation of trustees.
§ 1701. Appeal from decree settling account.
§ 1702. Trustee may decline.
§ 1703. Jurisdiction.
§ 1703½. Distribution to treasurer.

§ 1699. Where any trust has been created by or under any will to continue after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust. And any trustee created by any will, or appointed to execute any trust created by any will, may, from time to time, pending the execution of his trust, or may at the termination thereof, render and pray for the settlement of his accounts as such trustee, before the superior court in which the will was probated, and in the manner provided for the settlement of the accounts of executors and administrators. The trustee, or in case of his death, his legal representatives, shall for that purpose present to the court his verified petition, setting forth his accounts in detail, together with a verified statement of said trustee, giving the names and postoffice addresses, if known, of the cestuis que trust, and

upon the filing thereof, the court or judge shall fix a day for the hearing. The clerk must thereupon give notice thereof of not less than ten days, by causing notices to be posted in at least three public places in the county, setting forth the name of the trust estate, the trustee, and the day appointed for the settlement of the account. The court, or a judge thereof, may order such further notice to be given as may be proper, and any such trustee may in the discretion of the court, upon application of any beneficiary of the trust, be ordered to appear and render his account, after being cited by service of citation, as provided for the service of summons in civil cases. Upon the filing of the account so ordered, the same proceedings for the hearing and settlement thereof shall be had as are hereinabove provided. [Amendment approved March 16, 1895. Stats. 1889, p. 338. In effect March 19, 1889.]

§ 1700. On all such accountings the court shall allow the trustee or trustees the proper expenses and such compensation for services as the court may adjudge to be just and reasonable, and shall apportion such compensation among the trustees according to the services rendered by them respectively, and may in its discretion fix a yearly compensation for the trustee or trustees to continue as long as the court may judge proper. [Amendment approved March 19, 1889; Stats. 1889, p. 64. In effect March 19, 1895.]

§ 1701. From a decree settling such account appeal may be taken in the manner provided for an appeal from a decree settling the account of an executor or administrator. The decree of the superior court, if affirmed on appeal or becoming final without appeal, shall be conclusive. [Amendment approved March 19, 1889; Stats. 1889, p. 338. In effect March 19, 1889.]

§ 1702. Any person named or designated as a trustee in any will which has been or shall hereafter be admitted to probate in this state may, at any time before final distribution, decline to act as such trustee, and an order of court shall thereupon be made accepting such resignation; but the declination of any such person who has qualified as executor shall not be accepted by the court, unless the same shall be in writing and filed in the court in which the administration is pending, and such notice shall be given thereof as is required upon a petition praying for letters of administration. The court in which the administration is pending shall have power at any time before final distribution to appoint some fit and proper person to fill any vacancy in the office of trustee under the will, whether resulting from such declination or otherwise; provided, it shall be by law necessary that such vacancy shall be filled; and every person so appointed shall, before acting as trustee, give a bond such as is required by section one thousand three hundred and eighty-eight of this code, of a person to whom letters of administration are directed to issue. Such appointment may be made upon the written application of any person interested in the trust, and shall only be made after notice to all parties interested in the trust, given in the same manner as notice is required to be given of the hearing upon a petition for the probate of a will. In each of the preceding cases the court may order such further notice as shall seem necessary. In accepting any declination under the provisions of this section, the court may make and enforce any order which may be necessary for the preservation of the estate. [New section added March 2, 1891; Stats. 1891, p. 16, to take effect immediately.]

§ 1703. The provisions of the next preceding section shall apply in all cases where a final de-

cree of distribution has not been made; but the jurisdiction given by said section shall not exclude, in cases to which it applies, the jurisdiction now possessed by the courts of this State. [New section approved March 2, 1891; Stats. 1891, p. 16. To take effect immediately.]

§ 1703½. When any estate is distributed by the judgment or decree of the court, as provided in this chapter, to a minor or incompetent person who has no lawful guardian to receive the same, or person authorized to receipt therefor, the portion of said estate consisting of money shall be paid to and deposited with the County Treasurer of the county in which the estate is being probated, who shall give a receipt for the same, and shall be liable on his official bond therefor; and said receipt shall be deemed and received by the court or judge thereof as a voucher in favor of said executor or administrator, with the same force and effect as if executed by the distributee thereof. And this section shall be applicable to any and all estates now pending in which a final decree of discharge has not been granted. Said moneys so paid into the county treasury, shall be paid out, upon petition to, and the order of the superior court or judge thereof, to the person entitled to receive the same. [Approved February 26, 1897; Stats. 1897, ch. 40. In effect immediately.]

CHAPTER XII.

OF ORDERS, DECREES, PROCESS, MINUTES, RECORDS, TRIALS, AND APPEALS.

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§ **1704.** Orders and decrees made by the court, or a judge thereof, in probate proceedings, need not recite the existence of facts, or the performance of acts, upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided in this title. All orders and decrees of the court or judge must be entered at length in the minute book of the court. [Amendment approved April 16, 1880; Amendments 1880, p. 104. In effect April 16, 1880.]

§ 1705. When any publication is ordered, such publication must be made daily, or otherwise as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this title. The court, or a judge thereof, may, however, order a less number of publications during the period. [Amendment approved April 16, 1880; Amendments 1880, p. 104. In effect April 16, 1880.]

Affidavit of publication: Secs. 2010, 2011.

§ 1706. When it is provided in this title that any order or decree of the court, or a judge thereof, or a copy thereof, must be recorded in the office of the county recorder, from the time of filing the same for record, notice is imparted to all persons of the contents thereof. [Amendment approved April 16, 1880; Amendments 1880, p. 105. In effect April 16, 1880.]

§ 1707. Citations must be directed to the person to be cited, signed by the clerk and issued under the seal of the court, and must contain—

1. The title of the proceeding;
2. A brief statement of the nature of the proceeding;
3. A direction that the person cited appear at a time and place specified.

§ 1708. The citation may be issued by the clerk upon the application of any party without an order of the judge, except in cases in which such order is by the provisions of this title expressly required.

§ 1709. The citation must be served in the same manner as a summons in a civil action.

Service of citation—time for, sec. 1711; same manner as summons in a civil action, see sec. 410 et seq.

§ 1710. When personal notice is required, and no mode of giving it is prescribed in this title, it must be given by citation.

§ 1711. When no other time is specially prescribed in this title, citations must be served at least five days before the return day thereof.

§ 1712. When a complete description of the real property of an estate sought to be sold has been given and published in a newspaper, as required in the order to show cause why the sale should not be made, such description need not be published in any subsequent notice of sale or notice of a petition for the confirmation thereof; it is sufficient to refer to the description contained in the publication of the first notice, as being proved and on file in the court.

§ 1713. Except as otherwise provided in this title, the provisions of part two of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this title.

Part II: See ante, secs. 307 et seq.

§ 1714. The provisions of part two of this Code, relative to new trials and appeals—except in so far as they are inconsistent with the provisions of this title—apply to the proceedings mentioned in this title.

See ante, secs. 656 et seq., and secs. 936 et seq.

§ 1715. The appeal must be taken within sixty days after the order, decree, or judgment is entered.

Appeals from superior courts—in probate matters, sec. 963, subd. 3.

§ 1716. All issues of fact joined in probate proceedings must be tried in conformity with the requirements of article two, chapter two, of this

title, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court, as in civil actions. [Amendment approved April 16, 1880; Amendments 1880, p. 106. In effect July 16, 1880.]

Trial of issues—see sec. 1717.

§ 1717. If no jury is demanded, the court must try the issues joined. If on written demand a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either may move for a new trial, upon the same grounds and errors, and in like manner, as provided in this Code for civil actions.

New trials: See sec. 1714.

§ 1718. At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate, and confirmations thereof; settlements, partitions, and distributions of estates, setting apart homesteads, and all other proceedings where all the parties interested in the estate are required to be notified thereof; the court may, in its discretion, appoint some competent attorney at law to represent in all such proceedings, the devisees, legatees, heirs, or creditors of the decedent, who are minors and have no general guardian in the county, or who are non-residents of the State; and those interested who, though they are neither such minors or non-residents, are unrepresented. The order must specify the names of the

parties so far as known for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The attorney may receive a fee, to be fixed by the court, for his services, which must be paid out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney. If, for any cause, it becomes necessary, the court may substitute another attorney for the one first appointed, in which case the fee must be proportionately divided. The non-appointment of an attorney will not affect the validity of any of the proceedings. [Amendment approved April 16, 1880; Amendments 1880, p. 106. In effect July 16, 1880.]

§ 1719. When a judgment or decree is made, setting apart a homestead, confirming a sale, making distribution of real property, or determining any other matter affecting the title to real property, a certified copy of the same must be recorded in the office of the recorder of the county in which the property is situated. [Amendment approved March 24, 1874; Amendments 1873-4, p. 375. In effect July 1, 1874.]

§ 1720. When it is not otherwise prescribed in this title, the superior court, or the supreme court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require. Execution for the costs may issue out of the superior court. [Amendment approved April 16, 1880; Amendments 1880, p. 106. In effect July 16, 1880.]

Costs against executor—or administrator: Sec. 1509.

§ 1721. Whenever an executor, administrator, or guardian is committed for contempt in disobey-

ing any lawful order of the court, or a judge thereof, and has remained in custody for thirty days without obeying such order, or purging himself otherwise of the contempt, the court may, by order reciting the facts, and without further showing or notice, revoke his letters and appoint some other person entitled thereto executor, administrator, or guardian in his stead. [Amendment approved April 16, 1880; Amendments 1880, p. 106. In effect July 16, 1880.]

§ 1722. Whenever an infant, insane, or incompetent person has a guardian of his estate residing in this State, personal service upon the guardian of any process, notice, or order of the court concerning the estate of a deceased person in which the ward is interested, is equivalent to service upon the ward, and it is the duty of the guardian to attend to the interests of the ward in the matter. Such guardian may also appear for his ward and waive any process, notice, or order to show cause which an adult or a person of sound mind might do. [Amendment approved April 16, 1880; Amendments 1880, p. 107. In effect July 16, 1880.]

§ 1723. If any person has died or shall hereafter die who at the time of his death was the owner of a life estate which terminates by reason of the death of such person, or if such person at the time of his death was one of the spouses owning and occupying lands as a homestead, which lands by reason of the death of such person, vests in the surviving spouse; or if such person was a married woman who at time of her death was the owner of community property which passed upon her death to the surviving husband; any person interested in the property, or in the title thereto, in which such estates or interests were held, may file in the superior court of the county in which the property is situated, his verified

petition setting forth such facts, and thereupon and after such notice by publication or otherwise, as the court may order, the court shall hear such petition and the evidence offered in support thereof, and if upon such hearing it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, or such homestead or community property vested in the survivor of such marriage, the court shall make a decree to that effect, and thereupon a certified copy of such decree may be recorded in the office of the County Recorder, and thereafter shall have the same effect as a final decree of distribution so recorded. [Approved March 4, 1897; Stats. 1897, ch. 71. In effect immediately.]

CHAPTER XIII.

OF PUBLIC ADMINISTRATOR.

§ 1726. What estate to be administered by public administrator.
§ 1727. Public administrator to obtain letters, when and how. His bond and oath.
§ 1728. Duty of persons in whose house any stranger dies.
§ 1729. Must return inventory and administer estates according to this title.
§ 1730. When another person is appointed administrator or executor, public administrator to deliver up the estate.
§ 1731. Civil officers to give notice of waste to public administrator.
§ 1732. Suits for property of decedents.
§ 1733. Order to examine party charged with embezzling estate.
§ 1734. Punishment for refusing to attend.
§ 1735. Order on public administrator to account.
§ 1736. Every six months to make and publish return of condition of estate.
§ 1737. When there are no heirs or claimants, moneys and effects paid to county treasurer, etc.
§ 1738. Not to be interested in the payments for or on account of estates in his hands.
§ 1739. When to settle with county clerk, and how unclaimed estate disposed of.
§ 1740. Proceedings, how and by whom instituted, against public administrator failing to pay over money as ordered.
§ 1741. Fees of officers, when and by whom paid.
§ 1742. Public administrator to administer oaths.
§ 1743. Preceding chapters applicable to public administrator.
§ 1744. Misdemeanor, when guilty of.

§ 1726. Every public administrator, duly elected, commissioned, and qualified, must take charge of the estates of persons dying within his county as follows:

1. Of the estate of decedents for which no administrators are appointed, and which, in consequence thereof, are being wasted, uncared for, or lost;

2. Of the estates of decedents who have no known heirs;

3. Of the estates ordered into his hands by the court; and

4. Of the estates upon which letters of administration have been issued to him by the court. [Amendment, approved April 16, 1880; Amendments 1880, p. 107; Amendments 1880, p. 306. In effect July 16, 1880.]

Public administrator.—By act approved March 30, 1872, Stats. 1871-2, which took effect immediately, if the public administrator of any county of this state fails to qualify, or in person fails to perform the duties of his office, the coroner of such county shall be ex officio public administrator; and in case both public administrator and coroner fail to qualify, or perform the duties appertaining thereto, the supervisors shall appoint a suitable person to be public administrator; and all laws applicable to the qualification, powers, duties, and compensation of public administrator shall apply to the coroner or appointee of the supervisors as aforesaid.

Fees: Sec. 1618.

§ 1727. Whenever a public administrator takes charge of an estate, which he is entitled to administer without letters of administration being issued, or under order of the court, he must, with all convenient dispatch, procure letters of administration thereon, in like manner and on like proceedings as letters of administration are issued to other persons. His official bond and oath are in lieu of the administrator's bond and oath, but when real estate is ordered to be sold, another bond may be required by the court.

Delivering estate to another appointee, secs. 1730, 1735.

Bond on sale of real estate: Sec. 1389.

§ 1728. Whenever a stranger, or person without known heirs, dies intestate in the house or premises of another, the possessor of such premises, or anyone knowing the facts, must give immediate notice thereof to the public administrator of the county; and in default of so doing, he is liable for any damage that may be sustained thereby, to be recovered by the public administrator, or any party interested.

§ 1729. The public administrator must make and return a perfect inventory of all estates taken into his possession, administer and account for the same according to the provisions of this title, subject to the control and directions of the court. [Amendment, approved April 1880; Amendments 1880, p. 107. In effect July 16, 1880.]

§ 1730. If, at any time, letters testamentary or of administration are regularly granted to any other person on an estate of which the public administrator has charge, he must, under the order of the court, account for, pay, and deliver to the executor or administrator thus appointed, all the money, property, papers, and estate of every kind in his possession or under his control. [Amendment, approved April 16, 1880; Amendments 1880, p. 107. In effect July 16, 1880.]

§ 1731. All civil officers must inform the public administrator of all property known to them, belonging to a decedent, which is liable to loss, injury, or waste, and which, by reason thereof, ought to be in possession of the public administrator.

§ 1732. The public administrator must institute all suits and prosecutions necessary to recover the property, debts, papers, or other estate of the decedent.

§ 1733. When the public administrator complains to the superior court, or a judge thereof, on oath, that any person has concealed, embezzled, or disposed of, or has in his possession any money, goods, property, or effects, to the possession of which such administrator is entitled in his official capacity, the court or judge may cite such person to appear before the court, and may examine him, on oath, touching the matter of such complaint. [Amendment, approved April 16, 1880; Amendments 1880, p. 107. In effect July 16, 1880.]

Citation: Secs. 1707-1711.

§ 1734. All such interrogatories and answers must be reduced to writing and signed by the party examined, and filed in the court. If the person so cited refuses to appear and submit to such examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may commit him to the county jail, there to remain, in close custody, until he submits to the order of the court. [Amendment, approved April 16, 1880; Amendments 1880, p. 107. In effect July 16, 1880.]

Contempt: Secs. 1209, 1219.

§ 1735. The court may, at any time, order the public administrator to account for and deliver all the money and property of an estate in his hands to the heirs, or to the executors or administrators regularly appointed. [Amendment, approved April 16, 1880; Amendments 1880, p. 108. In effect July 16, 1880.]

§ 1736. The public administrator, or any person who received letters of administration while acting as public administrator, must, once in every six months, make to the superior court, under oath, a return of all the estates of decedents which have come into his hands, the value of each

estate, the money which has come into his hands from every such estate, and what he has done with it, and the amount of his fees, and expenses incurred in each estate, and the balance, if any, in each such case remaining in his hands; publish the same six times in some newspaper published in the county, or if there is none, then post the same, legibly written or printed, in the office of the county clerk of the county. One copy of the return must be filed with papers in each estate so reported. [Amendment, approved March 26, 1895; Stats. 1895, p. 157. In effect March 26, 1895.]

§ 1737. It is the duty of every public administrator, as soon as he shall receive the same, to deposit with the county treasurer of the county in which the probate proceedings are pending, all moneys of the estate not required for the current expenses of the administration; and such moneys may be drawn upon the order of the executor or administrator, countersigned by a superior judge, when required for the purposes of administration. It shall be the duty of the county treasurer to receive and safely keep all such moneys, and pay them out upon the order of the executor or administrator, when countersigned by a superior judge, and not otherwise, and to keep an account with such estate of all moneys received and paid to him; and the county treasurer shall be allowed one per cent upon all moneys received and kept by him, and no greater fees for any services herein provided; and for the safe keeping and payment of all such moneys, as herein provided, the said treasurer and his sureties shall be responsible upon his official bond. The moneys thus deposited may, upon order of the court, be invested, pending the proceedings, in securities of the United States, or of this State, when such investment is deemed by the court to be for the best interests of the estate. After a final settlement of the af-

fairs of any estate, if there be no heirs, or other claimants thereof, the county treasurer shall pay into the State treasury all moneys and effects in his hands belonging to the estate, upon order of the court; and if any such moneys and effects escheat to the State, they must be disposed of as other escheated estates. [Amendment, approved April 16, 1880; Amendments 1880, p. 108. In effect July 16, 1880.]

Escheated estates. Secs. 1269-1272.

§ 1738. The public administrator must not be interested in the expenditures of any kind made on account of any estate he administers, nor must he be associated in business or otherwise with anyone who is so interested, and he must attach to his report and publication, made in accordance with the preceding section, his affidavit to that effect.

§ 1739. Public administrators are required to account, under oath, and to settle and adjust their accounts relating to the care and disbursement of money or property belonging to estates in their hands, with the county clerks of their respective counties, on the first Monday in January and July in each year; one copy of said account to be filed with the papers in each of such estates; and they must pay to the county treasurer any money remaining in their hands of an estate unclaimed, as provided in sections sixteen hundred and ninety-three to sixteen hundred and ninety-six, both inclusive. [Amendment, approved March 26, 1895; Stats. 1895, p. 124. In effect March 26, 1895.]

§ 1740. When it appears, from the returns made in pursuance of the foregoing sections, that any money remains in the hands of the public administrator (after a final settlement of the estate) unclaimed, which should be paid over to the coun-

ty treasurer, the superior court, or a judge thereof, must order the same to be paid over to the county treasurer; and on failure of the public administrator to comply with the order within ten days after the same is made, the district attorney for the county must immediately institute the requisite legal proceedings against the public administrator for a judgment against him and the sureties on his official bond, in the amount of money so withheld, and costs. [Amendment, approved April 16, 1880; Amendments 1880, p. 108. In effect July 16, 1880.]

§ 1741. The fees of all officers chargeable to estates in the hands of public administrators, must be paid out of the assets thereof so soon as the same come into his hands.

§ 1742. Public administrators may administer oaths in regard to all matters touching the discharge of their duties, or the administration of estates in their hands.

Administration of oaths: Sec. 2093 et seq.

§ 1743. When no direction is given in this chapter for the government or guidance of a public administrator in the discharge of his duties, or for the administration of an estate in his hands, the provisions of the preceding chapters of this title must govern.

§ 1744. Every public administrator, or person who holds letters of administration, who was appointed while acting as public administrator, who fails to comply with the provisions of sections seventeen hundred and thirty-five, seventeen hundred and thirty-six, and section seventeen hundred and thirty-nine of this Code, is guilty of a misdemeanor; and upon conviction thereof, shall be punished by a fine not less than one hundred dollars for each offense; and it shall be the duty of the dis-

trict attorney of the county to see that the provisions of this chapter are fully complied with. [New section approved March 9, 1895; Stats. 1895, p. 38. In effect March 9, 1895.]

CHAPTER XIV.

OF GUARDIAN AND WARD.

Article I. Guardians of Minors.
II. Guardians of Insane and Incompetent Persons.
III. The Powers and Duties of Guardians.
IV. The Sale of Property and Disposition of Proceeds.
V. Nonresident Guardians and Wards.
VI. General and Miscellaneous Provisions.

ARTICLE I.

GUARDIANS OF MINORS.

§ 1747. Judge to appoint guardians, when and on what petition.
§ 1748. When minor may nominate guardian; when not.
§ 1749. When appointment may be made by judge, when minor is over fourteen.
§ 1750. Nomination by minors after arriving at fourteen.
§ 1751. Father or mother entitled to guardianship.
§ 1752. Minor having no father or mother.
§ 1753. Powers and duties of guardian.
§ 1754. Bond of guardian, conditions of.
§ 1755. Probate judge may insert conditions in order appointing guardian.
§ 1756. Letters of guardianship and bond of guardian to be recorded.
§ 1757. Maintenance of minor out of income of his own property.
§ 1758. Guardian to give bond. Powers limited.
§ 1759. Power of courts to appoint guardians and next friend not impaired.

§ 1747. The superior court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are

inhabitants or residents of the county, or who reside without the State and have estate within the county. Such appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age. Before making such appointment, the court must cause such notice as such court deems reasonable to be given to any person having the care of such minor, and to such relatives of the minor residing in the county as the court may deem proper. [Amendment, approved April 15, 1880; Amendments 1880, p. 65. In effect April 15, 1880.]

Powers and duties of guardians: Sec. 1768 et seq.

Guardian and ward: See Civil Code, secs. 236-258.

Guardian ad litem: See sec. 1759.

Minors.—Minors are: 1. Males under twenty-one years of age; 2. Females under eighteen years of age: Civil Code, sec. 25. The periods specified in the preceding section must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority: Id., sec. 26. The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child, or by its relative within the third degree, or by the supervisors of the county where the child resides; and when the abuse is established, the child may be freed from the dominion of the parent, and the duty of support and education enforced: Id., sec. 203. The authority of a parent ceases: 1. Upon the appointment, by a court, of a guardian of the person of a child; 2. Upon the marriage of the child; or 3. Upon its attaining majority: Id., sec. 204.

Infant party to action, etc., guardian: Sec. 372, 373, 1722, 1769.

Seal necessary to appointment of guardian: Sec. 152, subd. 2.

§ 1748. If the minor is under the age of fourteen years, the court may nominate and appoint his guardian. If he is fourteen years of age, he may nominate his own guardian, who, if approved by the court, must be appointed accordingly. [Amendment, approved April 15, 1880; Amendments 1880, p. 65. In effect April 15, 1880.]

§ 1749. If the guardian nominated by the minor is not approved by the court, or if the minor resides out of the State, or if, after being duly cited by the court, he neglects for ten days to nominate a suitable person, the court or judge may nominate and appoint the guardian in the same manner as if the minor were under the age of fourteen years. [Amendment, approved April 15, 1880; Amendments 1880, p. 65. In effect April 15, 1880.]

§ 1750. When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor, at any time after he attains that age, may appoint his own guardian, subject to the approval of the court. [Amendment, approved April 15, 1880; Amendments 1880, p. 65. In effect April 15, 1880.]

§ 1751. The father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child, in preference to any other person. The person nominated by a minor of the age of fourteen years as his guardian, whether married or unmarried, may, if found by the court competent to discharge the duties of guardianship, be appointed as such guardian. The authority of a guardian is not extinguished nor affected by the marriage of the guardian. [Amendment approved March 19, 1891; Stats. 1891, p. 136.]

Parent.—The parent, as such, has no control over the property of the child: Civ. Code, sec. 202.

Bond, testamentary guardian must give: Sec. 1758.

Residence.—A parent entitled to the custody of a child has a right to change his residence, subject to the power of the proper court to restrain a removal which would prejudice the rights or welfare of the child: Civ. Code, sec. 213.

§ 1752. If the minor has no father or mother living, competent to have the custody and care of his education, the guardian appointed shall have the same.

§ 1753. Every guardian appointed shall have the custody and care of the education of the minor, and the care and management of his estate, until such minor arrives at the age of majority or marries, or until the guardian is legally discharged.

§ 1754. Before the order appointing any person guardian under this chapter takes effect, and before letters issue, the court must require of such person a bond to the minor with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law, and the following conditions shall form a part of such bond without being expressed therein:

1. To make an inventory of all the estate, real and personal, of his ward, that comes to his possession or knowledge, and to return the same within such time as the court may order:

2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody, and education of the ward;

3. To render an account on oath of the property, estate, and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs, and at the expiration of his trust to settle his accounts with the court, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto. Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form the letters of guardianship must be substantially the same as letters of administration, and the oath of the guardian must be indorsed thereon that he will perform the duties of his office as such guardian according to law. [Amendment, approved April 15, 1880; Amendments 1880, p. 65. In effect April 15, 1880.]

Accounts of guardians—rendering: Secs. 1773, 1774.

§ 1755. When any person is appointed guardian of a minor, the court may, with the consent of such person, insert in the order of appointment, conditions not otherwise obligatory, providing for the care, treatment, education, and welfare of the minor. The performance of such conditions shall be a part of the duties of the guardian, for the faithful performance of which he and the sureties on his bond shall be responsible. [Amendment approved April 15, 1880; Amendments 1880, p. 66. In effect April 15, 1880.]

Guardian's bond—liability on: Sec. 1407.

Letters of guardianship—special, issuable at chambers: Sec. 166.

§ 1756. All letters of guardianship issued, and all guardians' bonds executed under the provis-

ions of this chapter, with the affidavits and certificates thereon, must be recorded by the clerk of the court having jurisdiction of the persons and estates of the wards. [Amendment approved April 15, 1880; Amendments 1880, p. 66. In effect April 15, 1880.]

§ 1757. If any minor having a father living has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the court; and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian. [Amendment approved April 15, 1880; Amendments 1880, p. 66. In effect April 15, 1880.]

§ 1758. Every testamentary guardian must give bond and qualify, and has the same powers and must perform the same duties with regard to the person and estate of his ward as guardians appointed by the court, except so far as their powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed. [Amendment approved April 15, 1880; Amendments 1880, p. 67. In effect April 15, 1880.]

Testamentary guardian—bond of: See sec. 1754.

§ 1759. Nothing contained in this chapter affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein.

Guardian ad litem: Secs. 372, 373, 1722, 1769.

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ARTICLE II.

GUARDIANS OF INSANE AND INCOMPETENT PERSONS.

§ 1763. Guardians of insane and other incompetent persons.
§ 1764. Appointment by probate judge after hearing.
§ 1765. Powers and duties of such guardians.
§ 1766. Petition for restoration to capacity.
§ 1767. Definition of incompetent.

§ 1763. When it is represented to the superior court, or a judge thereof, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed; and such person, if able to attend, must be produced on the hearing. [Amendment approved April 15, 1880; Amendments 1880, p. 67. In effect April 15, 1880.]

Insane person: Homestead of, see Stats. 1874, p. 582.

Guardian ad litem—of insane or incompetent person, secs. 372, 373, 1722.

Lunatic.—A person of unsound mind may be placed in an asylum for such persons, upon the order of the superior court of the county in which he resides, as follows: 1. The court must be satisfied, upon examination in open court and in the presence of such person, from the testimony of two reputable physicians, that such person is of unsound mind, and unfit to be at large; 2. After the order is granted, the person alleged to be of unsound mind, his or her husband or wife, or relative to the third degree, or any citizen, may demand an investigation before a jury, which must be conducted in all respects as under an inquisition of lunacy: Civ. Code, sec. 258.

Sale of homestead where husband or wife insane: Civ. Code, sec. 1242.

§ 1764. If, after a full hearing and examination upon such petition, it appear to the court that the person in question is incapable of taking care of himself and managing his property, such court must appoint a guardian of his person and estate, with the powers and duties in this chapter specified. [Amendment approved April 15, 1880; Amendments 1880, p. 67. In effect April 15, 1880.]

Jurisdiction to appoint guardian: Sec. 97, subd. 2; at chambers: Sec. 166; seal necessary: Sec. 152.

§ 1765. Every guardian appointed, as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions as before prescribed with respect to the guardian of a minor.

Bond of guardian: Sec. 1754.

§ 1766. Any person who has been declared insane or incompetent, or the guardian, or any relative of such person within the third degree, or any friend, may apply, by petition, to the superior court of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined. The petition shall be verified, and shall state that such person is then sane or competent. Upon receiving the petition, the court must appoint a day for a hearing before the court, and, if the petitioner request it, shall order an investigation before a jury, which shall be summoned and impaneled in the same manner as juries are summoned and impaneled in civil actions. The court shall cause notice of the trial to be given to the guardian of the person so declared

insane or incompetent, if there be a guardian, and to his or her husband or wife, if there be one, and to his or her father or mother, if living in the county. On the trial, the guardian or relative of the person so declared insane or incompetent, and, in the discretion of the court, any other person may contest the right to the relief demanded. Witnesses may be required to appear and testify, as in civil cases, and may be called and examined by the court on its own motion. If it be found that the person be of sound mind, and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardian of such person, if such person be not a minor, shall cease. [Amendment, approved April 15, 1880; Amendments 1880, p. 67. In effect April 15, 1880.]

§ **1767.** The phrase "incompetent," "mentally incompetent," and "incapable," as used in this chapter, shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons. [New section added March 10, 1891; Stats. 1891, p. 68; in effect immediately.]

ARTICLE III.

THE POWERS AND DUTIES OF GUARDIANS.

§ 1768. Guardian to pay debts of ward out of ward's estate.
§ 1769. Guardian to recover debts due his ward and represent him.
§ 1770. Guardian to manage his estate, maintain ward, and sell real estate.
§ 1771. Maintenance, support, and education of ward, how enforced.
§ 1772. May assent to a partition of real estate.
§ 1773. Guardian to return inventory of estate of ward. Appraisers to be appointed. Like proceedings when other property acquired.
§ 1774. Settlements of guardians.
§ 1775. Allowance of accounts of joint guardians.
§ 1776. Expenses and compensation of guardians.

§ 1768. Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward, out of his personal estate, and the income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided in this title for the sale of real estate of decedents.

Order of sale of property: Sec. 1770.

§ 1769. Every guardian must settle all acounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the court, compound for the same and give discharges to the debtor, on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person be appointed for that purpose. [Amendment, approved April 15, 1880; Amendments 1880, p. 68. In effect April 15, 1880.]

§ 1770. Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining an order of the court therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.

Sale of property—and disposition of proceeds, sec. 1777 et seq.

§ 1771. When a guardian has advanced for the necessary maintenance, support, or education of his ward, an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlements. Whenever a guardian fails, neglects, or refuses to furnish suitable or necessary maintenance, support, or education for his ward, the court may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support, or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process.

§ 1772. The guardian may join in and assent to a partition of the real estate of the ward, wherever such assent may be given by any person.

Assent to partition: Sec. 795.

Appearance by guardian: Secs. 372, 1722.

§ 1773. Every guardian must return to the

court an inventory of the estate of his ward within three months after his appointment, and annually thereafter. When the value of the estate exceeds the sum of one hundred thousand dollars, semi-annual returns must be made to the court. The court may, upon application made for that purpose by any person, compel the guardian to render an account to the court of the estate of his ward. The inventories and accounts so to be returned or rendered must be sworn to by the guardian. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn, and acting in the manner provided for regulating the settlement of the estates of decedents. Such inventory, with the appraisement of the property therein described, must be recorded by the clerk of the court in a proper book kept in his office for that purpose. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to, or acquired by any ward, or for his benefit, the like proceedings must be had for the return and appraisement thereof that are herein provided in relation to the first inventory and return. [Amendment, approved April 15, 1880; Amendments 1880, p. 68. In effect April 15, 1880.]

Where joint guardians: Sec. 1775.
Appraisers—generally: Sec. 1444.
May be appointed at chambers: Sec. 166.

§ 1774. The guardian must, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, present his account to the court for settlement and allowance. [Amendment, approved April 15, 1880; Amendments 1880, p. 68. In effect April 15, 1880.]

Accounts of guardian: Sec. 1773.

§ 1775. When an account is rendered by two or more joint guardians, the court may, in its discretion, allow the same upon the oath of any of them. [Amendment, approved April 15, 1880; Amendments 1880, p. 68. In effect April 15, 1880.]

§ 1776. Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable.

Expenses incurred—advances made: Sec. 1771.

ARTICLE IV.

THE SALE OF PROPERTY AND DISPOSITION OF THE PROCEEDS.

§ 1777. May sell property in certain cases.
§ 1778. Sale of real estate to be made upon order of court.
§ 1779. Application of proceeds of sales.
§ 1780. Investment of proceeds of sales.
§ 1781. Order for sale, how obtained.
§ 1782. Notice to next of kin, how given.
§ 1783. Copy of order to be served, published, or consent filed.
§ 1784. Hearing of application.
§ 1785. Who may be examined on such hearing.
§ 1786. Costs to be awarded, to whom.
§ 1787. Order of sale, to specify what.
§ 1788. Bond before selling.
§ 1789. All proceedings for sales of property by guardians to conform to chapter seven of this title.
§ 1790. Limit of order of sale.
§ 1791. Conditions of sales of real estate of minor heirs. Bond and mortgage to be given for deferred payments.
§ 1792. Court may order the investment of money of the ward.

§ 1777. When the income of an estate under guardianship is insufficient to maintain the ward and his family, or to maintain and educate the

ward when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor.

Power of guardian—to sell property: Sec. 1768.

§ 1778. When it appears to the satisfaction of the court, upon the petition of the guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor.

Order for sale of property: Sec. 1768.

§ 1779. If the estate is sold for the purposes mentioned in this article, the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

§ 1780. If the estate is sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the court. [Amendment, approved April 15, 1880; Amendments 1880, p. 68. In effect April 15, 1880.]

§ 1781. To obtain an order for such sale, the guardian must present to the court in which he was appointed guardian a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which

the petition is founded, tending to show the necessity or expediency of a sale. [Amendment, approved April 15, 1880; Amendments 1880, p. 69. In effect April 15, 1880.]

§ 1782. If it appear to the court, or a judge thereof, from the petition, that it is necessary or would be beneficial to the ward that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary or would be beneficial to the ward to sell the personal estate, or some part of it, the court must order the sale to be made. [Amendment, approved April 15, 1880; Amendments 1880, p. 69. In effect April 15, 1880.]

§ 1783. A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least once a week for three successive weeks in a newspaper printed in the county, or if there be none printed in the county, then in such newspaper as may be specified by the court in the order. If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served or published. [Amendment, approved April 15, 1880; Amendments 1880, p. 69. In effect April 15, 1880.]

Notice: Compare sec. 1539.

§ 1784. The court, at the time and place appointed in the order, or such other time to which

the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner, and of the next of kin, and of all other persons interested in the estate who oppose the application. [Amendment, approved April 15, 1880; Amendments 1880, p. 69. In effect April 15, 1880.]

Compare: Sec. 1540.

§ 1785. On the hearing, the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel their attendance and testimony may be issued by the court, in the same manner and with like effect as in other cases provided for in this title. [Amendment, approved April 15, 1880; Amendments 1880, p. 69. In effect April 15, 1880.]

Compelling attendance and testimony of witnesses: Secs. 1305, 1985 et seq.

§ 1786. If any person appears and objects to the granting of any order prayed for under the provisions of this article, and it appear to the court that either the petition or the objection thereto is sustained, the court may, in granting or refusing the order, award costs to the party prevailing, and enforce the payment thereof.

§ 1787. If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate, or some part thereof, should be sold, the court may grant an order therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same has been been prayed for in the petition, order such sale to be made either at public or private sale.

§ 1788. Every guardian authorized to sell real estate must, before the sale, give bond to the ward, with sufficient surety, to be approved by the court, or a judge thereof, with condition to sell

the same in the manner, and to account for the proceeds of the sale as provided for in this chapter, and chapter seven of this title. [Amendment approved April 15, 1880; Amendments 1880, p. 69. In effect April 15, 1880.]

Bond on sale of realty: Sec. 1389.

§ 1789. All the proceedings under petition of guardians for sales of property of their wards, giving notice, and the hearing of such petitions, granting or refusing the order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale, and application for confirmation thereof, notice and hearing of such application, making orders rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts, must be had and made as required by the provisions of this title concerning estates of decedents, unless otherwise specially provided in this chapter.

Settlement of accounts, of guardian of infant after letters revoked: Sec. 1629.

§ 1790. No order of sale, granted in pursuance of this article, continues in force more than one year after granting the same, without a sale being had.

§ 1791. All sales of real estate of wards must be for cash, or for part cash and part deferred payments, the credit in no case to exceed three years from date of sale, as in the discretion of the court is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers, in case of deferred payments, notes, and a mortgage on the real estate sold, with such additional security as the court deems necessary and sufficient to secure the prompt payment of the amounts so deferred, and the interest thereon. [Amendment approved April 15, 1880; Amendments 1880, p. 70. In effect April 15, 1880.]

§ 1792. The court, on the application of a guardian, or any person interested in the estate of any ward, after such notice to persons interested therein as the court shall direct, may authorize and require the guardian to invest the proceeds of sales and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein, and the court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects, as circumstances require. [Amendment approved April 15, 1880; Amendments 1880, p. 70. In effect April 15, 1880.]

ARTICLE V.

NONRESIDENT GUARDIANS AND WARD.

§ 1793. Guardians of nonresident persons.
§ 1794. Powers and duties of guardians appointed under preceding section.
§ 1795. Such guardians to give bonds.
§ 1796. To what guardianship shall extend.
§ 1797. Removal of nonresident ward's property.
§ 1798. Proceedings on such removal.
§ 1799. Discharge of person in possession.

§ 1793. When a person liable to be put under guardianship, according to the provisions of this chapter, resides without this State and has estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to the Superior Court of any county in which there is any estate of such absent person, for the appointment of a guardian, and if, after notice given to all interested, in such manner as such court orders by publication or otherwise, and a full hearing and examination, it appears proper, a guardian for such absent person may be appointed. [Amendment approved April 15, 1880; Amendments 1880, p. 70. In effect April 15, 1880.]

Foreign guardian: Sec. 1913.
Guardian, appearance by, etc.: Secs. 1722, 372.
Judge may appoint guardians and issue letters of guardianship at chambers: Sec. 167.

§ 1794. Every guardian, appointed under the preceding section, has the same powers and performs the same duties, with respect to the estate of the ward found within this State, and with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian appointed under this chapter.

§ 1795. Every guardian must give bond to the ward, in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, must be confined to such estate and effects as come to his hands in this State.

Bond, inventory, account, etc.: Sec. 1754.

§ 1796. The guardianship which is first lawfully granted of any person residing without this State extends to all the estate of the ward within this State, and excludes the jurisdiction of the court of every other county. [Amendment approved April 15, 1880; Amendments 1880, p. 70. In effect April 15, 1880.]

§ 1797. When the guardian and ward are both nonresidents, and the ward is entitled to property in this State, which may be removed to another State or foreign country without conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the State or foreign country of the residence of the ward, upon the application of the guardian to the Superior Court of the county in

which the estate of the ward, or the principal part thereof, is situated. [Amendment approved April 15, 1880; Amendments 1880, p. 70. In effect April 15, 1880.]

§ 1798. The application must be made upon ten days' notice to the resident executor, administrator, or guardian, if there be such, and upon such application the nonresident guardian must produce and file a certificate, under the hand of the clerk and seal of the court, from which his appointment was derived, showing:

1. A transcript of the record of his appointment;
2. That he has entered upon the discharge of his duties;
3. That he is entitled, by the laws of the State of his appointment, to the possession of the estate of the ward; or, must produce and file a certificate, under the hand and seal of the clerk of the court having jurisdiction in the country of his residence, of the estates of persons under guardianship, or of the highest court of such country, attested by a minister, consul, or vice-consul of the United States, resident in such country, that, by the laws of such country, the applicant is entitled to the custody of the estate of his ward, without the appointment of any court. Upon such application, unless good cause to the contrary is shown, the court must make an order granting to such guardian leave to take and remove the property of his ward to the State or place of his residence, which is authority to him to sue for and receive the same in his own name, for the use and benefit of his ward. [Amendment approved April 15, 1880; Amendments 1880, p. 71. In effect April 15, 1880.]

§ 1799. Such order is a discharge of the executor, administrator, local guardian, or other person in whose possession the property may be at the

time the order is made, on filing with the clerk of the court a receipt therefor of a foreign guardian of such absent ward, and transmitting a duplicate receipt, or a certified copy of such receipt, to the court from which such nonresident guardian received his appointment. [Amendment approved March 8, 1895; Stats. 1895, p. 28. In effect in sixty days.]

ARTICLE VI.

GENERAL AND MISCELLANEOUS PROVISIONS.

§ 1800. Examination of persons suspected of defrauding wards or concealing property.
§ 1801. Removal and resignation of guardian, and surrender of estate.
§ 1802. Guardianship, how terminated.
§ 1803. New bond, when required.
§ 1804. Guardian's bond to be filed. Action on.
§ 1805. Limitation of actions on guardian's bond.
§ 1806. Limitation of actions for the recovery of property sold.
§ 1807. More than one guardian of a person may be appointed.
§ 1808. Power of probate judge in chambers.
§ 1809. Provisions of section ten hundred and fifty-seven apply to guardians.

§ 1800. Upon complaint made to him by any guardian, ward, creditor, or other person interested in the estate or having a prospective interest therein as heir or otherwise, against any one suspected of having concealed, embezzled, or conveyed away any of the money, goods, or effects, or an instrument in writing belonging to the ward or to his estate, the Superior Court, or a judge thereof, may cite such suspected person to appear before such court, and may examine and proceed with him on such charge in the manner provided in this title with respect to persons suspected of and charged with concealing or embezzling the effects of a decedent. [Amendment approved

April 15, 1880; Amendments 1880, p. 71. In effect April 15, 1880.]

Embezzlement of property of estate: Sec. 1458 et seq.

§ 1801. When a guardian, apointed either by the testator or a court, becomes insane or otherwise incapable of discharging his trust or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days to render an account or make a return, the Superior Court may, upon such notice to the guardian as the court may require, remove him and compel him to surrender the estate of the ward to the person found to be lawfully entitled thereto. Every guardian may resign when it appears proper to allow the same; and upon the resignation or removal of a guardian, as herein provided, the court may appoint another in the place of the guardian who resigned or was removed. [Amendment approved April 15, 1880; Amendments 1880, p. 71. In effect April 15, 1880.]

§ 1802. The marriage of a minor ward terminates the guardianship of the person of such ward, but not the estate; and the guardian of an insane or other person may be discharged by the court, when it appears, on the application of the ward or otherwise, that the guardianship is no longer necessary. [Amendment approved April 15, 1880; Amendments 1880, p. 72. In effect April 15, 1880.]

§ 1803. The court may require a new bond to be given by a guardian whenever such court deems it necessary, and may discharge the existing sureties from further liability, after due notice given as such court may direct, when it shall appear that no injury can result therefrom to those interested in the estate. [Amendment approved April 15, 1880; Amendments 1880, p. 72. In effect April 15, 1880.]

§ 1804. Every bond given by a guardian must be filed and preserved in the office of the clerk of the Superior Court of the county, and in case of a breach of a condition thereof, may be prosecuted for the use and benefit of the ward, or of any person interested in the estate. [Amendment approved April 15, 1880; Amendments 1880, p. 71. In effect April 15, 1880.]

Suit on bond, party beneficially interested: Sec. 367.

§ 1805. No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge or removal of the guardian; but if, at the time of such discharge, the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed.

§ 1806. No action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or, when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.

§ 1807. The court, in its discretion, whenever necessary, may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and liable in all respects as a sole guardian.

§ 1808. Any order appointing a guardian, must be entered as and become a decree of the court. The provisions of this title relative to the estates of decedents, so far as they relate to the practice

in the Superior Court, apply to proceedings under this chapter. [Amendment approved April 15, 1880; Amendments 1880, p. 72. In effect April 15, 1880.]

Chambers, power at: Secs. 166, 176.

§ **1809.** The provisions of section ten hundred and fifty-seven are hereby declared to apply to guardians appointed by the court, and to the bonds taken or to be taken from such guardians, and to the sureties on such bonds.

TITLE XII.

OF SOLE TRADERS.

§ 1811. Who may become sole traders.
§ 1812. Notice, how given and what to contain.
§ 1813. Petition, what to contain when filed.
§ 1814. May have five hundred dollars of community or husband's property.
§ 1815. Who may oppose it, and how.
§ 1816. Trial or hearing.
§ 1817. Decree, what it must be.
§ 1818. Oath, copy of order to be recorded.
§ 1819. Rights and liabilities of sole traders.
§ 1820. Sole trader must maintain her children.
§ 1821. Husband of sole trader not liable for debts.

§ **1811.** A married woman may become a sole trader by the judgment of the Superior Court of the county in which she has resided for six months next preceding the application. [Amendment approved February 26, 1881; Stats. 1881, p. 10. In effect February 26, 1881.]

§ **1812.** A person intending to make application to become a sole trader must publish notice of such intention in a newspaper published in the county, or, if none, then in a newspaper published in an adjoining county, once a week for four successive weeks. The notice must specify the

day upon which application will be made, the nature and place of the business proposed to be conducted by her, and the name of her husband. [Amendment approved February 26, 1881; Stats. 1881, p. 10. In effect February 26, 1881.]

Term, abolition of terms: Sec. 73.

§ 1813. Ten days prior to the day named in the notice, the applicant must file a verified petition setting forth:

1. That the application is made in good faith, to enable the applicant to support herself, or herself and others dependent upon her, giving their names and relation;

2. The fact of insufficient support from her husband, and the causes thereof, if known;

3. Any other grounds of application which are good causes for a divorce, with the reason why a divorce is not sought; and

4. The nature of the business proposed to be conducted, and the capital to be invested therein, if any, and the sources from which it is derived.

§ 1814. The applicant may invest in the business proposed to be conducted, a sum derived from the community property or of the separate property of the husband, not exceeding five hundred dollars.

§ 1815. Any creditor of the husband may oppose the application, by filing in the court (prior to the day named in the notice) a written opposition verified, containing either:

1. A specific denial of the truth of any material allegation of the petition; or setting forth,

2. That the application is made for the purpose of defrauding the opponent; or

3. That the application is made to prevent, or will prevent him from collecting his debt.

§ 1816. On the day named in the notice, or on

such other day to which the hearing may be postponed by the court, the applicant must make proof of publication of the notice hereinbefore required, and the issues of fact joined, if any, must be tried as in other cases; if no issues are joined, the court must hear the proofs of the applicant and find the facts in accordance therewith.

§ 1817. If the facts found sustain the petition, the court must render judgment authorizing the applicant to carry on in her own name and on her own account the business specified in the notice and petition.

§ 1818. The sole trader must make and file with the clerk of the court an affidavit, in the following form:

I, A. B., do, in the presence of Almighty God, solemnly swear that this application was made in good faith, for the purpose of enabling me to support myself (and any dependent, such as husband, parent, sister, child, or the like, naming them, if any), and not with any view to defraud, delay, or hinder any creditor or creditors of my husband; and that of the moneys so to be used by me in business, not more than five hundred dollars have come either directly or indirectly from my husband. So held me God.

A certified copy of the decree, with this oath indorsed thereon, must be recorded in the office of the recorder of the county where the business is to be carried on, in a book to be kept for such purpose.

§ 1819. When the judgment is made and entered, and a copy thereof, with the affidavit provided for in section one thousand eight hundred and eighteen, duly recorded, the person therein named is entitled to carry on the business specified, in her own name, and the property, revenues, money, and credits so by her invested, and

the profits thereof, belong exclusively to her, and are not liable for any debts of her husband, and she, thereafter, has all the privileges of, and is liable to all legal processes provided for debtors and creditors, and may sue and be sued alone without being joined with her husband; provided, however, that she shall not be at liberty to carry on said business in any other county than that named in the notice provided for in section one thousand eight hundred and twelve, until she has recorded in such other county a copy of said judgment and affidavit. [Amendment approved March 16, 1876; Amendments 1875-6, p. 105. In effect March 16, 1876.]

Sue and be sued alone: Sec. 370.

Husband and wife parties to actions: Secs. 370, 371.

§ **1820.** A married woman who is adjudged a sole trader is responsible and liable for the maintenance of her minor children.

§ **1821.** The husband of a sole trader is not liable for any debts contracted by her in the course of her sole trader's business, unless contracted upon his written consent.

TITLE XIII.

OF PROCEEDINGS IN INSOLVENCY.

§ 1822. Statutes in relation to, continued in force.

§ 1822. Nothing in this Code affects any of the provisions of "an act for the relief of insolvent debtors and protection of creditors," approved May 4, 1852, or of the acts amendatory thereof, approved respectively March 12, 1858, April 27, 1860, and April 27, 1863; but such acts are recognized as continuing in force notwithstanding the provisions of this Code.

Insolvency act: See post, Appendix, p. 817 et seq.

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PART IV.

OF EVIDENCE.

General Definitions, §§ 1823-1839.
Title I. Of General Principles, §§ 1844-1870.
II. Kinds and Degrees of Evidence, §§ 1875-1978.
III. Production of Evidence, §§ 1981-2054.
IV. Effect of Evidence, § 2061.
V. Rights and Duties of Witnesses, §§ 2064-2070.
VI. Evidence in Particular Cases, and General Provisions, §§ 2074-2103.

OF EVIDENCE.

GENERAL DEFINITIONS AND DIVISIONS.

§ 1823. Definition of evidence.
§ 1824. Definition of proof.
§ 1825. Definition of law of evidence.
§ 1826. The degree of certainty required to establish facts.
§ 1827. Four kinds of evidence specified.
§ 1828. Several degrees of evidence specified.
§ 1829. Primary evidence defined.
§ 1830. Secondary evidence defined.
§ 1831. Direct evidence defined.
§ 1832. Indirect evidence defined.
§ 1833. Prima facie evidence defined.
§ 1834. Partial evidence defined.
§ 1835. Satisfactory evidence defined.
§ 1836. Indispensable evidence defined.
§ 1837. Conclusive evidence defined.
§ 1838. Cumulative evidence defined.
§ 1839. Corroborative evidence defined.

§ 1823. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

Evidence, law of: Sec. 1825; kinds of: Sec. 1827; degrees of: Sec. 1828 et seq; relevancy of: Secs. 1868, 1870; production of: See sec. 1825, subd. 3; value and effect of: See sec. 1825, subd. 5.

§ 1824. Proof is the effect of evidence, the establishment of a fact by evidence.

Proof, degree required: Sec. 1826; order of: Secs. 607, 2042; extent of: Secs. 1867, 1869; limits of: Secs. 1868, 1870; burden of: Secs. 1869, 1981.

§ 1825. The law of evidence, which is the subject of this part of the Code, is a collection of general rules established by law:

1. For declaring what is to be taken as true without proof;

2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and,

3. For the production of legal evidence;

4. For the exclusion of whatever is not legal;

5. For determining in certain cases, the value and effect of evidence.

Subdivision 2. Presumptions: Secs. 1959, 1961-1963 and notes.

Subdivision 3. Production of evidence: Secs. 1981-2054.

Subdivision 4. Exclusion of evidence: Secs. 1867, 1868.

Subdivision 5. Value and effect of evidence: Sec. 2061; also see sec. 1828 et seq.

§ 1826. The law does not require demonstrations; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

Proof: Sec. 1824.

§ 1827. There are four kinds of evidence:
1. The knowledge of the court;
2. The testimony of witnesses;
3. Writings;
4. Other material objects presented to the senses.

Subdivision 1. Knowledge of the court: Sec. 1875.
Subdivision 2. Witnesses: Secs. 1878-1884.
Subdivision 3. Writings: Secs. 1887-1951.
Subdivision 4. Other material objects: Sec. 1954.

§ 1828. There are several degrees of evidence:
1. Primary and secondary;
2. Direct and indirect;
3. Prima facie, partial, satisfactory, indispensable, and conclusive. [Amendment approved March 24, 1874; Amendments 1873-4, p. 379. In effect July 1, 1874.]

§ 1829. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents. [Amendment approved March 24, 1874; Amendments 1873-4, p. 379. In effect July 1, 1874.]

§ 1830. Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument, or oral evidence of its contents, is secondary evidence of the instrument and contents. [Amendment approved March 24, 1874; Amendments 1873-4, p. 379. In effect July 1, 1874.]

Contents of a writing, evidence of: Sec. 1855.

§ 1831. Direct evidence is that which proves the fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example: if the fact in dispute be an agreement, the evidence

of a witness who was present, and witnessed the making of it, is direct.

§ 1832. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred.

Indirect evidence: Secs. 1957-1963.

§ 1833. Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: the certificate of a recording officer is prima facie evidence of a record, but it may afterward be rejected upon proof that there is no such record. [Amendment approved March 24, 1874; Amendments 1873-4, p. 379. In effect July 1, 1874.]

Disputable presumption: Sec. 1963.

§ 1834. Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts. For example: on an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterward connected with the fact in dispute.

Connected with the fact in dispute: Sec. 1868.

§ 1835. That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence.

Satisfactory evidence, to justify verdict: Sec. 2061, subd. 5.

§ 1836. Indispensable evidence is that without which a particular fact cannot be proved.

Indispensable evidence: Secs. 1967-1974.

§ 1837. Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example: the record of a court of competent jurisdiction cannot be contradicted by the parties to it.

Conclusive evidence: Secs. 1908, 1962, 1978.

§ 1838. Cumulative evidence is additional evidence of the same character to the same point.

§ 1839. Corroborative evidence is additional evidence of a different character, to the same point.

TITLE I.

OF THE GENERAL PRINCIPLES OF EVIDENCE.

§ 1844. One witness sufficient to prove a fact.
§ 1845. Testimony confined to personal knowledge.
§ 1846. Testimony to be in presence of persons affected.
§ 1847. Witness presumed to speak the truth.
§ 1848. One person not affected by acts of another.
§ 1849. Declarations of predecessor in title evidence.
§ 1850. Declarations which are a part of the transaction.
§ 1851. Evidence relating to third person.
§ 1852. Declaration of decedent evidence of pedigree.
§ 1853. Declaration of decedent evidence against his successor in interest.
§ 1854. When part of a transaction proved, the whole is admissible.
§ 1855. Contents of writing, how proved.
§ 1856. An agreement reduced to writing deemed the whole.
§ 1857. Construction of language relates to place where used.
§ 1858. Construction of statutes and instruments, general rule.
§ 1859. The intention of the Legislature or parties.
§ 1860. The circumstances to be considered.
§ 1861. Terms to be construed in their general acceptation.
§ 1862. Written words control those printed in a blank form.
§ 1863. Persons skilled may testify to decipher characters.
§ 1864. Of two constructions, which preferred.
§ 1865. A written instrument construed as understood by parties.
§ 1866. Construction in favor of natural right preferred.
§ 1867. Material allegations only to be proved.
§ 1868. Evidence confined to material allegations.
§ 1869. Affirmative only to be proved.
§ 1870. Facts which may be proved on trial.

§ 1844. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason.

One witness, witness, definition: Sec. 1878; witness, competency: Sec. 1879 et seq.; two witnesses for lost or destroyed will: Sec. 1339; perjury and treason, more than one witness, sec. 1968.

§ **1845.** A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible.

Opinions, inferences, declarations: See sec. 1870.

§ **1846.** A witness can be heard only upon oath or affirmation, and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine.

Witness, defined: Sec. 1878.

Witnesses, competency of: Sec. 1879 et seq.

Oath or affirmation, administration of: Secs. 2093-2097.

Examination of witnesses: Secs. 2042-2054.

§ **1847.** A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

Witness: Secs. 1878 et seq.

Presumed to speak the truth: Sec. 1963, subd. 1; evidence of good character: Sec. 2053.

Presumption repelled, manner of testifying: Sec. 2061, subd. 2; character of testimony: Sec. 2061, subd. 3; impeaching credit: Secs. 2049, 2051, 2052; contradictory evidence: Secs. 2049, 2051.

Jury exclusive judges of credibility: Sec. 2061.

§ **1848.** The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another. [Amendment approved March 24, 1874; Amendments 1873-4, p. 380. In effect July 1, 1874.]

Books, entries in: Sec. 1946.

Declaration, etc., of another, when admissible: Secs. 1849-1853; partner, agent, etc.: Sec. 1870, subd. 5.

§ 1849. Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former.

§ 1850. Where, also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction.

Declarations before others: Sec. 1870, subd. 3; declaration: Sec. 1870, subd. 4; writing evidence, to explain: Sec. 1860.

§ 1851. And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties. [Amendment approved March 24, 1874; Amendments 1873-4, p. 380. In effect July 1, 1874.]

§ 1852. The declaration, act, or omission of a member of a family, who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible.

Declaration of decedent: Sec. 1870, subd. 4.

Common reputation on questions of pedigree, etc.: Sec. 1870, subd. 11.

§ 1853. The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.

Decedent's declaration against interest: Sec. 1870, subd. 4; entries and other writings: Sec. 1946.

§ 1854. When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence.

Refreshing memory, witness.—Opposite party has a right to see the document: Sec. 2047.

Cross-examination: Sec. 2048.

§ 1855. There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1. Where the original has been lost or destroyed; in which case proof of the loss or destruction must first be made;

2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice;

3. When the original is a record or other document in the custody of a public officer;

4. When the original has been recorded, and a certified copy of the record is made evidence by this Code or other statute;

5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

In the cases mentioned in subdivisions three and four, a copy of the original or of the record must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents. [Amendment approved March 24, 1874; Amendments 1873-4, p. 380. In effect July 1, 1874.]

Contents of writing, showing permissible: Secs. 1937, 1969.

Original in possession of opponent, notice to produce: Secs. 1938, 1939.

Public writings generally: Secs. 1892-1926.

Affidavits: Secs. 2009 et seq.

Subdivision 4. Certified copies of records: See secs. 1919 et seq.

§ 1856. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

Writing supersedes oral negotiations: Civ. Code, sec. 1625; parol evidence to vary or contradict written agreement: Civ. Code, sec. 1639; fraud, to establish: See Civ. Code, sec. 1640; mistake or imperfection, to correct: Sec. 1856, subd. 1, supra; Civ. Code, sec. 1640; revision and reformation of contracts for fraud or mistake: Civ. Code, secs. 3399-3402; surrounding circumstances to show: Sec. 1860; where validity of agreement controverted: Sec. 1856, subd. 2, supra.

Absolute conveyance.—Mortgage: Sec. 744.

Recitals in document: Sec. 1962, subd. 2.

Usage, etc.: Sec. 1870, subd. 12.
Conveyances of real property: Sec. 2077.
Date: Sec. 1962, subd. 2.
Consideration: Sec. 1962, subd. 2.
Alterations and erasures: Sec. 1982.

§ 1857. The language of a writing is to be interpreted according to the meaning it bears in the place of its execution, unless the parties have reference to a different place.

Interpretation of contract, lex loci: Civ. Code, sec. 1646.

§ 1858. In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Construction, generally: Sec. 1859; giving effect to all: Civ. Code, secs. 1641, 3541.

§ 1859. In a construction of a statute, the intention of the Legislature, and in the construction of the instrument, the intention of the parties, is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one, that is inconsistent with it.

Words giving joint authority give authority to a majority unless otherwise expressed in the "act" giving the authority: Sec. 15, ante. Construction of this Code: Secs. 4-18, ante.

Directory statutes: Secs. 225, 632.

Repeals.—Conflict between statutes or parts of same statutes, retroactive operation, etc.: Sec. 18.

Time, computation of, construction of statutes directing: Sec. 12.

Mistake: Sec. 1856; estoppel: Sec. 1962; usage: Sec. 1870, subd. 12; deeds as to real property: Sec. 2077.

§ 1860. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.

Surrounding circumstances may be shown: Civ. Code, sec. 1047; usage: Sec. 1870, subd. 12; descriptive part of conveyance: Sec. 2077.

§ 1861. The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly.

Signification of terms: Compare Civ. Code, secs. 1644, 1645. See, also, sec. 1870, subd. 12, post.

§ 1862. When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter.

Compare Civ. Code, sec. 1651.

§ 1863. When the characters in which an instrument is written are difficult to be deciphered, or the language of the instrument is not understood by the court, the evidence of persons skilled in deciphering the characters, or who understand the language, is admissible to declare the characters or the meaning of the language.

See sec. 1870, subds. 9, 10.

§ 1864. When the terms of an agreement have been intended in a different sense by the different

parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.

Compare Civ. Code, secs. 1649, 1654.

§ 1865. A written notice, as well as every other writing, is to be construed according to the ordinary acceptation of its terms. Thus, a notice to the drawers or indorsers of a bill of exchange or promissory note, that it has been protested for want of acceptance or payment, must be held to import that the same has been duly presented for acceptance or payment, and the same refused, and that the holder looks for payment to the person to whom the notice is given.

Ordinary acceptation: See sec. 1861. Compare Civ. Code, sec. 1644; notice of dishonor: Civ. Code, sec. 3143.

§ 1866. When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted.

§ 1867. None but a material allegation need be proved.

Complaint: See sec. 426; material allegation, defined: Sec. 463; not controverted: Sec. 462.

Material evidence: See sec. 1868.

§ 1868. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

Variance, secs. 469-471.

Relevant evidence.—Objection or exception to evidence: Sec. 646.

Collateral fact, connecting: Sec. 1870; credibility of witness: Secs. 1847, 1870, subd. 16.

Material: See sec. 1867.

§ 1869. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

Burden of proof: Sec. 1981.

§ 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

1. The precise fact in dispute;

2. The act, declaration, or omission of a party, as evidence against such party;

3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto;

4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death;

5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule ap-

plies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party;

6. After proof of a conspiracy, the act or declaration of a conspirator against his coconspirator, and relating to the conspiracy;

7. The act, declaration, or omission forming part of a transaction, as explained in section eighteen hundred and fifty;

8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter;

9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein;

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given;

11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary;

12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation;

13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family bibles, or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree;

14. The contents of a writing, when oral evidence thereof is admissible;

15. Any other facts from which the facts in issue are presumed or are logically inferable;

16. Such facts as serve to show the credibility of a witness, as explained in section eighteen hundred and forty-seven.

Offer to compromise: Sec. 2078; confession in divorce suit: Sec. 2079.

Subd. 7. Res gestae: See sec. 1850, ante.

TITLE II.

OF THE KINDS AND DEGREES OF EVIDENCE.

Chapter I. Knowledge of the court, § 1875.
II. Witnesses, §§ 1878-1884.
III. Writings, §§ 1887-1951.
IV. Material objects presented to the senses, other than writings, § 1954.
V. Indirect evidence, §§ 1957-1963.
VI. Indispensable evidence, §§ 1967-1974.
VII. Conclusive and unanswerable evidence, § 1978.

CHAPTER I.

KNOWLEDGE OF THE COURT.

§ 1875. Certain facts of general notoriety assumed to be true. Specification of such facts.

§ 1875. Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of all legal expressions:

2. Whatever is established by law;

3. Public and private official acts of the legislative, executive, and judicial departments of this State and of the United States;

4. The seals of all the courts of this State and of the United States;

5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this State and of the United States;

6. The existence, title, national flag, and seal of every State or sovereign recognized by the executive power of the United States;

7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;

8. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all these cases the court may resort for its aid to appropriate books or documents of reference.

CHAPTER II.

WITNESSES.

§ 1878. Witnesses defined.
§ 1879. All persons capable of perceptions and communication may be witnesses.
§ 1880. Persons who cannot testify.
§ 1881. Persons in certain relations to parties prohibited.
§ 1882. When privileged persons must testify.
§ 1883. Jludge or a juror may be witness.
§ 1884. When an interpreter to be sworn.

§ 1878. A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit.

Compare: Sec. 2002.

Oral examination: Sec. 1846; general rules of: Sec. 2042 et seq.

Deposition: Secs. 2019-2038.

Affidavit: Secs. 2009-2015.

§ 1879. All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and,

perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, as provided in section eighteen hundred and forty-seven.

Persons incompetent—to witnesses: Sec. 1880.

§ 1880. The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination;

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly;

3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person. [Amendment approved April 16, 1880; Amendments 1880, p. 112. In effect April 16, 1880.]

§ 1881. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other dur-

ing the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other;

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity;

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs;

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient;

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure. [Amendment approved March 23, 1893; Stats. 1893, p. 301. In effect immediately.]

§ 1882. Repealed. [Amendments 1875-6, 105. In effect February 28, 1876.]

§ 1883. The judge himself or any juror may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge or jury.

§ 1884. When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person,

a resident of the proper county, may be summoned by any court or judge to appear before such court or judge to act as interpreter in any action or proceeding. The summons must be served and returned in like manner as a subpoena. Any person so summoned, who fails to attend at the time and place named in the summons, is guilty of a contempt.

Subpoena: Sec. 1985, et seq.

Contempt: Secs. 1209, 1219.

Acts authorizing appointment of Italian interpreter: See post, Appendix, p. 856.

CHAPTER III.

WRITINGS.

Article I. Writings in General.
II. Public Writings.
III. Private Writings.

ARTICLE I.

WRITINGS IN GENERAL.

§ 1887. Writings, public and private.
§ 1888. Public writings defined.
§ 1889. All others private.

§ 1887. Writings are of two kinds:

1. Public; and,
2. Private.

§ 1888. Public writings are:

1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this State, of the United States, of a sister State, or of a foreign country;
2. Public records, kept in this State, of private writings.

§ 1889. All other writings are private.

ARTICLE II.

PUBLIC WRITINGS.

§ 1892. Every citizen entitled to inspect and copy public writings.
§ 1893. Public officers bound to give copies.
§ 1894. Four kinds of public writings.
§ 1895. Laws, written or unwritten.
§ 1896. Written laws defined.
§ 1897. Constitution and statutes.
§ 1898. Public and private statutes defined.
§ 1899. Unwritten law defined.
§ 1900. Books containing laws presumed to be correct.
§ 1901. Public seal authenticates a law or document.
§ 1902. Other evidence of laws of other States.
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§ 1904. Judicial record defined.
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§ 1906. Record of a foreign country, how authenticated.
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§ 1910. Where parties are to be deemed the same.
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§ 1912. Where sureties bound, principal is also.
§ 1913. Record of another State, its effect.
§ 1914. Record of a court of admiralty.
§ 1915. Effect of a foreign judgment.
§ 1916. Manner of impeaching a record.
§ 1917. The jurisdiction necessary in a judgment.
§ 1918. Manner of proving other official documents.
§ 1919. Public record of private writing evidence.
§ 1920. Entries in official books primary evidence.
§ 1921. Justice's judgment in other States, how proved.
§ 1922. Same.
§ 1923. Contents of other official certificates.
§ 1924. Provisions in relation to States apply to Territories.
§ 1925. Certificates of purchase primary evidence of ownership.
§ 1926. Entries made by officers or boards primary evidence.

§ 1892. Every citizen has a right to inspect and take a copy of any public writing of this State, except as otherwise expressly provided by statute.

Public records, etc., open to inspection: Polit.

§ 1893. Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing. [Amendment approved March 24, 1874; Amendments 1873-4, p. 381. In effect July 1, 1874.]

Inspection: The public records, and other matters in the office of any officer, are at all times, during office hours, open to the inspection of any citizen of this state. In all actions for divorce, the pleadings and the testimony taken and filed in said actions shall not be by the clerk with whom the same is filed, or the referee before whom the testimony is taken, made public, nor shall the same be allowed to be inspected by any person except the parties that may be interested, or the attorneys to the action, or by an order of the court in which the action is pending; a copy of said order must be filed with the clerk. In cases of attachment, the clerk of the court with whom the complaint is filed shall not make public the fact of the filing of such complaint, or of the issuing of such attachment, until after the filing of return of service of attachment: Polit. Code, sec. 1032.

§ 1894. Public writings are divided into four classes:

1. Laws;
2. Judicial records;
3. Other official documents;
4. Public records, kept in this State, of private writings.

§ 1895. Laws, whether organic or ordinary, are either written or unwritten.

§ 1896. A written law is that which is promulgated in writing, and of which a record is in existence.

§ 1897. The organic law is the constitution of government, and is altogether written. Other written laws are denominated statutes. The written law of this State is therefore contained in its Constitution and statutes, and in the Constitution and statutes of the United States.

§ 1898. Statutes are public or private. A private statute is one which concerns only certain designated individuals and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations.

§ 1899. Unwritten law is the law not promulgated and recorded, as mentioned in section eighteen hundred and ninety-six, but which is, nevertheless, observed and administered in the courts of the country. It has no certain repository, but is collected from the reports of the decisions of the courts and the treatises of learned men.

§ 1900. Books printed or published under the authority of a sister State or foreign country, and purporting to contain the statutes, code, or other written law of such State or country, or proved to be commonly admitted in the tribunals of such State or country, as evidence of the written law thereof, are admissible in this State as evidence of such law.

Books—historical, etc., sec. 1936; resort to, sec. 1875; authority of, sec. 1963; subd. 35, 36.
Sister State—scope of expression: Sec. 1924.

§ 1901. A copy of the written law or other public writing of any State or country, attested by the certificate of the officer having charge of the

original, under the public seal of the State or country, is admissible as evidence of such law or writing. [Amendment approved March 24, 1874; Amendments 1873-4, p. 381. In effect July 1, 1874.]

See post, sec. 1919.

Certificate—requisites of: Sec. 1923.

§ 1902. The oral testimony of witnesses, skilled therein, is admissible as evidence of the unwritten law of a sister State or foreign country, as are also printed and published books of reports of decisions of the courts of such State or country, or proved to be commonly admitted in such courts.

§ 1903. The recitals in a public statute are conclusive evidence of the facts recited, for the purpose of carrying it into effect, but no further. The recitals in a private statute are conclusive evidence between parties who claim under its provisions, but no further.

Recitals—in written instrument: Sec. 1962, subd. 2.

§ 1904. A judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding.

Judgment roll: Sec. 670.

Execution book as evidence: Sec. 683.

§ 1905. A judicial record of this State, or of the United States, may be proved by the production of the original or by a copy thereof certified by the clerk or other person having the legal custody thereof. That of a sister State may be proved by the attestation of the clerk, and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.

Judicial record, need of seal: Sec. 153, subd. 3; appointment of executor, etc., sec. 1429.

Judicial record of a sister State—U. S. Const. art. 4, sec. 1.

Certificate: Sec. 1923.

§ 1906. A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge or presiding magistrate, that the person making the attestation is the clerk of the court, or the legal keeper of the record, and, in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or embassador, or a consul, vice-consul, or consular agent of the United States in such foreign country. [Amendment approved March, 24, 1874; Amendments 1873-4, p. 382. In effect July 1, 1874.]

Certificate: Sec. 1923.

§ 1907. A copy of the judicial record of a foreign country is also admissible in evidence, upon proof:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it:

2. That such original was in the custody of the clerk of the court, or other legal keeper of the same; and,

3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.

§ 1908. The effect of a judgment or final order in an action or special proceeding before a court or judge of this State, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person;

2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice actual or constructive, of the pendency of the action or proceeding. [Amendment approved March 24, 1874; Amendments 1873-4, p. 382. In effect July 1, 1874.]

See sec. 1912, post.

Jurisdiction, and collateral attacks: Sec. 1917.

Validity of judgment when founded on defective service by publication: Sec. 412.

Probate and administration, etc.: Sec. 1333.

Order for sale of lands: Sec. 1536.

Title: Sec. 409.

Parties, etc.: Sec. 1910.

Matter directly adjudged: Sec. 1911.

Counter-claim barred by defendant's omission to set up same: Sec. 439.

Partition, judgment in: Sec. 766.

Sureties: Sec. 1911.

§ 1909. Other judicial orders of a court or judge of this State, or of the United States, cre-

ate a disputable presumption, according to the matter directly determined, between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity.

Disputable presumptions: See sec. 1963 and notes.

Parties and privies: See sec. 1908, subd. 2, sec. 1910.

§ 1910. The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either.

§ 1911. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

§ 1912. Whenever, pursuant to the last four sections, a party is bound by a record, and such party stands in the relation of a surety for another, the latter is also bound from the time that he has notice of the action or proceeding, and an apportunity at the surety's request to join in the defense.

§ 1913. The effect of a judicial record of a sister State is the same in this State as in the State where it was made, except that it can only be enforced here by an action or special proceeding, and except, also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority.

§ 1914. The effect of the judicial record of a court of admiralty of a foreign country is the same as if it were the record of a court of admiralty of the United States.

§ 1915. The effect of the judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment, is as follows:

1. In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing;

2. In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title, and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

§ 1916. Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings.

§ 1917. The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment.

§ 1918. Other official documents may be proved as follows:

1. Acts of the executive of this State, by the records of the State Department of the State and of the United States, by the records of the State Department of the United States, certified by the heads of those departments respectively. They may also be proved by public documents printed by the order of the Legislature or Congress, or either house thereof;

2. The proceedings of the Legislature of this

State or of Congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk or printed by their order;

3. The acts of the executive, or the proceedings of the legislature of a sister State in the same manner;

4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States;

5. Acts of a municipal corporation of this State, or of a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the authority of such corporation;

6. Documents of any other class in this State, by the original, or by a copy, certified by the legal keeper thereof;

7. Documents of any other class in a sister State, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, judges of the supreme, superior, or county court, or mayor of a city of such State, that the copy is duly certified by the officer having the legal custody of the original;

8. Documents of any other class in a foreign country, by the original, or by a copy, certified by the legal keeper thereof, with a certificate, under seal of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody of the original;

9. Documents in the departments of the United States government, by the certificate of the legal custodian thereof. [Amendment approved March

24, 1874; Amendments 1873-4, p. 383. In effect July 1st, 1874.]

Certificate: Sec. 1923.

Documents in this state: See also sec. 1920.

Documents in sister state.—"Sister state" includes United States and territories: Sec. 1924.

§ 1919. A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record.

Compare sec. 1855, subd. 1.

Certificate: Sec. 1923.

Executor or administrator, appointment of: Sec. 1429.

§ 1920. Entries in public or other official books or records, made in the performance of his duty by a public officer of this State, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein. [In effect July 1st, 1874.]

Official documents—proof of, sec. 1918.

Entries—by officer or board of officers, etc: Sec. 1926.

§ 1921. A transcript from the record or docket of a justice of the peace of a sister State, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.

§ 1922. There must be attached to the transcript a certificate of the justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the clerk or prothonotary of the county in which the justice resided at the time of rendering the judgment, under the seal of the county, or the seal of the court of common pleas or county court

thereof, certifying that the person subscribing the transcript was, at the date of the judgment, a justice of the peace in the county, and that the signature is genuine. Such judgment, proceedings, and jurisdiction may also be proved by the justice himself, on the production of his docket, or by a copy of the judgment, and his oral examination as a witness.

§ 1923. Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the clerk of a court having a seal, under the seal of such court. [Amendment approved March 24, 1874; Amendments 1873-4, p. 384. In effect July 1st, 1874.]

§ 1924. The provisions of the preceding sections of this article applicable to the public writings of a sister State, are equally applicable to the public writings of the United States or a Territory of the United States. [Amendment approved March 24, 1874; Amendments 1873-4, p. 385. In effect July 1st, 1874.]

§ 1925. A certificate of purchase or of location of any lands in this State, issued or made in pursuance of any law of the United States or of this State, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

§ 1926. An entry made by an officer, or board

of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry. [Amendment approved March 24, 1874; Amendments, 1873-4, p. 385. In effect July 1st, 1874.]

ARTICLE III.

PRIVATE WRITINGS.

§ 1929. Private writings classified.
§ 1930. Seal defined.
§ 1931. Manner of making it.
§ 1932. Effect of a seal.
§ 1933. Execution of an instrument defined.
§ 1934. Compromise of a debt without seal good.
§ 1935. Subscribing witness defined.
§ 1936. Books, maps, etc., how far evidence.
§ 1937. Original writing to be produced or accounted for.
§ 1938. When in possession of adverse party, notice to be given.
§ 1939. Writings called for and inspected may be withheld.
§ 1940. Where there is a subscribing witness, the proof.
§ 1941. Other witnesses may also testify.
§ 1942. When evidence of execution not necessary.
§ 1943. Evidence of handwriting.
§ 1944. Allowed by comparison.
§ 1945. Same.
§ 1946. Entries of decedent's evidence in specified cases.
§ 1947. Copies of entries also allowed.
§ 1948. Private writings acknowledged and certified.
§ 1949. County clerks to keep private papers deposited.
§ 1950. Public records not to be carried about.
§ 1951. Instrument conveying or affecting real property may be read in evidence.

§ 1929. Private writings are either—

1. Sealed; or,
2. Unsealed.

No distinction—between sealed and unsealed writings: Sec. 1932.

§ 1930. A seal is a particular sign, made to attest in the most formal manner, the execution of an instrument.

Seal generally: Sec. 14; requisite: Sec. 1931.

§ 1931. A public seal in this State is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper, or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign, made in a sister State or foreign country, and there recognized as a seal, must be so regarded in this State. [Amendment approved March 24, 1874; Amendments 1873-4, p. 385. In effect July 1st, 1874.]

Scope of word "seal": Sec. 14.
Impression of seal—Civil Code: Sec. 1628.
Seals of courts: Secs. 147-153.

§ 1932. There shall be no difference hereafter, in this State, between sealed and unsealed writings. A writing under seal may therefore be changed, or altogether discharged, by a writing not under seal. [Amendment approved March 24, 1874; Amendments 1873-4, 386. In effect July 1st, 1874.]

Corresponding provisions: See Civil Code, sec. 1629.
Agreement of composition — requires no seal: Sec. 1934.

§ 1933. The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.

§ 1934. An agreement in writing without a seal for the compromise or settlement of a debt, is as obligatory as if a seal were affixed.

§ 1935. A subscribing witness is one who sees a writing executed or hears it acknowledged, and

at the request of the party thereupon signs his name as a witness.

§ 1936. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest. [Amendment approved March 24, 1874; Amendments 1873-4, 385. In effect July 1, 1874.]

Books—as aid to court: Sec. 1875; as evidence: Sec. 1900; presumptions as to: Sec. 1963, subds. 35, 36.

§ 1937. The original writing must be produced and proved, except as provided in sections eighteen hundred and fifty-five and nineteen hundred and nineteen. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents in some authentic document, or by the recollection of a witness, as provided in section eighteen hundred and fifty-five.

§ 1938. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party.

Document in possession—of opponent: Sec. 1855, subd. 2.

§ 1939. Though a writing called for by one party is produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case.

Writing shown to witness: See sec. 2054, post.

§ **1940.** Any writing may be proved either:

1. By any one who saw the writing executed; or,

2. By evidence of the genuineness of the handwriting of the maker; or,

3. By a subscribing witness. [Amendment approved March 24, 1874; Amendments 1873-4, 386. In effect July 1st, 1874.]

Proof of execution of writing—by admission: Sec. 1942.

Proof of handwriting: Sec. 1943.

Subscribing witness: Sec. 1935; other evidence of execution when admissible: Secs. 1941-1945; on contest of will: Sec. 1315.

§ **1941.** If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence.

§ **1942.** Where, however, evidence is given that the party against whom the writing is offered has at any time admitted its execution, no other evidence of the execution need be given, when the instrument is one mentioned in section nineteen hundred and forty-five, or one produced from the custody of the adverse party, and has been acted upon by him as genuine.

§ **1943.** The handwriting of a person may be proved by any one who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting.

§ **1944.** Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge. [Amendment approved March 24, 1874; Amendments 1873-4, 386. In effect July 1, 1874.]

§ 1945. Where a writing is more than thirty years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact.

Presumption—that ancient writing is genuine: Sec. 1963, subd. 34.

§ 1946. The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:

1. When the entry was made against the interest of the person making it;

2. When it was made in a professional capacity, and in the ordinary course of professional conduct;

3. When it was made in the performance of a duty specially enjoined by law. [Amendment approved March 24, 1874; Amendments 1873-4, 386. In effect July 1st, 1874.]

Entries in books—repeated: Sec. 1947; where alteration: Sec. 1982.

§ 1947. When an entry is repeated in the regular course of business, one being copied from another at or near the time of the transaction, all the entries are equally regarded as originals.

§ 1948. Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment of proof of conveyances of real property, and the certificate of such acknowledgment or proof is prima facie evidence of the execution of the writing in the same manner as if it were a conveyance of real property. [Amendment approved March 24, 1874; Amendments 1873-4, 387. In effect July 1, 1874.]

Conveyance of real property—as evidence: Sec. 1951.

§ **1949.** [Repealed March 24, 1874; Amendments 1873-4, 387. In effect July 1st, 1874.]

§ **1950.** The record of a conveyance of real property, or any other record, a transcript of which is admissible in evidence, must not be removed from the office where it is kept, except upon the order of a court, in cases where the inspection of the record is shown to be essential to the just determination of the cause or proceeding pending, or where the court is held in the same building with such office. [Amendment aproved March 24, 1874; Amendments 1873-4, 387. In effect July 1st, 1874.]

§ **1951.** Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof. [Amendment approved March 1, 1889; Amendments, 1889, 45. In effect March 1, 1889.]

Certified copy, etc: See sec. 1948, ante.

CHAPTER IV.

MATERIAL OBJECTS PRESENTED TO THE SENSES, OTHER THAN WRITINGS.

§ 1954. Material objects.

§ **1954.** Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evi-

dence, such object may be exhibited to the jury, or its existence, situation, or character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the court.

CHAPTER V.

INDIRECT EVIDENCE INFERENCES, AND PRESUMPTIONS.

§ 1957. Indirect evidence classified.
§ 1958. Inference defined.
§ 1959. Presumption defined.
§ 1960. When an inference arises.
§ 1961. Presumptions may be controverted, when.
§ 1962. Specification of conclusive presumptions.
§ 1963. All other presumptions may be controverted.

§ **1957.** Indirect evidence is of two kinds:
1. Inferences; and,
2. Presumptions.

§ **1958.** An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

§ **1959.** A presumption is a deduction which the law expressly directs to be made from particular facts.

§ **1960.** An inference must be founded—
1. On a fact legally proved; and,
2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

§ **1961.** A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so contro-

verted, the jury are bound to find according to the presumption.

§ 1962. The following presumptions, and no others, are deemed conclusive:

1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another.

2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration.

3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.

4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.

6. The judgment or order of a court, when declared by this Code to be conclusive; but such judgment or order must be alleged in the pleadings, if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence.

7. Any other presumption which, by statute, is expressly made conclusive.

Subd. 3. Standing by, etc.—One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers: Civ. Code, sec. 1709.

Tenant denying landlord's title: Civ. Code, sec. 1948.

Judgments, etc.: Sec. 1908. Other estoppels.—

Decree allowing executors, etc., accounts: Sec. 1638; evidence of notice on application for letters of administration: Sec. 1376; probate: Sec. 1333; conclusive evidence generally: Sec. 1978.

§ 1963. All other presumptions are satisfactoryy, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind.

1. That a person is innocent of crime or wrong.
2. That an unlawful act was done with an unlawful intent.
3. That a person intends the ordinary consequence of his voluntary act.
4. That a person takes ordinary care of his own concerns.
5. That evidence willfully suppressed would be adverse if produced.
6. That higher evidence would be adverse from inferior being produced.
7. That money paid by one to another was due to the latter.
8. That a thing delivered by one to another belonged to the latter.
9. That an obligation delivered up to the debtor has been paid.
10. That former rent or installments have been paid when a receipt for latter is produced.
11. That things which a person possesses are owned by him.
12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership.
13. That a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly.
14. That a person acting in a public office was regularly appointed to it.

15. That official duty has been regularly performed.

16. That a court or judge, acting as such, whether in this State or any other State or country, was acting in the lawful exercise of his jurisdiction.

17. That a judicial record, when not conclusive does still correctly determine or set forth the rights of the parties.

18. That all matters within an issue were laid before the jury and passed upon by them; and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them.

19. That private transactions have been fair and regular.

20. That the ordinary course of business has been followed.

21. That a promissory note or bill of exchange was given or indorsed for a sufficient consideration.

22. That an indorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill.

23. That a writing is truly dated.

24. That a letter duly directed and mailed was received in the regular course of the mail.

25. Identity of person from identity of name.

26. That a person not heard from in seven years is dead.

27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact.

28. That things have happened according to the ordinary course of nature and the ordinary habits of life.

29. That persons acting as copartners have entered into contract of copartnership.

30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.

31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.

32. That a thing once proved to exist continues as long as is usual with things of that nature.

33. That the law has been obeyed.

34. That a document or writing more than thirty years old, is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained.

35. That a printed and published book, purporting to be printed or published by public authority, was so printed or published.

36. That a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the State or country where the book is published, contains correct reports of such cases.

37. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest.

38. The uninterrupted use by the public of land for a burial ground, for five years, with the consent of the owner and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose.

39. That there was a good and sufficient consideration for a written contract.

40. When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to the following rules:

First.—If both of those who have perished were under the age of fifteen years, the older is presumed to have survived,

Second.—If both were above the age of sixty, the younger is presumed to have survived.

Third.—If one be under fifteen and the other above sixty, the former is presumed to have survived.

Fourth.—If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived. If the sexes be the same, then the older.

Fifth.—If one be under fifteen or over sixty, and the other between those ages, the latter is presumed to have survived.

Subds. 17, 18. Proceedings of courts: Sec. 87, and notes, and sec. 1908; on estoppels by judgment: Parnell v. Hahn, 61 Cal. 131.

Subd. 20. Ordinary course of business has been followed: Sec. 1960.

Subd. 21. Note or bill imports a consideration.—A written instrument is presumptive evidence of a consideration: Civ. Code, sec. 1614. The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it: Civ. Code, sec. 1615; McCann v. Lewis, 9 Cal. 247; McCarty v. Beach, 10 Id. 463; Winters v. Rush, 34 Id. 138; and see subd. 39 of this section.

Legitimacy: See Civ. Code, sec. 193.

Other presumptions.—Transcript of shorthand notes is prima facie evidence: Sec. 270, ante; order of probate court for disclosure of property of estate: Sec. 1460, ante; conveyance executed by executor, etc: Sec. 1601, ante. On sales of stock for delinquent assessments, the Civil Code, section 348, provides: The publication of notice required by this article may be proved by the affidavit of the printer, foreman, or principal clerk of the newspaper in which the same was published; and the affidavit of the secretary or auctioneer is prima facie evidence of the time and place of sale, of the quantity and particular description of the stock sold, and to whom, and for what price, and

of the fact of the purchase money being paid. The affidavits must be filed in the office of the corporation, and copies of the same certified by the secretary thereof, are prima facie evidence of the facts therein stated. Certificates signed by the secretary, and under the seal of the corporation, are prima facie evidence of the contents thereof.

Copies of the entries of a county clerk, when certified by him, and affidavits of publication made by the printer, publisher, or chief clerk of a newspaper, under sections 2466-2471 of the Civil Code, relating to the use of fictitious names in partnerships, are presumptive evidence of the facts therein stated: See note 426.

An affidavit of the making of the publication of the certificate of a special partnership, or its substance under sections 2477-2485 of the Civil Code, made by the printer, publisher, or the chief clerk of the newspaper in which such publication is made, may be filed with the county recorder with whom the original certificate was filed, and is presumptive evidence of the facts therein stated: Civ. Code, sec. 2484.

The protest of a notary, under his hand and official seal, of a bill of exchange or promissory note for non-acceptance or non-payment, stating the presentment for acceptance or payment, and the non-acceptance or non-payment thereof, the service of notice on any or all the parties to such bill of exchange or promissory note, and specifying the mode of giving such notice, and the reputed place of residence of the party to such bill of exchange or promissory note, and of the party to whom the same was given, and the postoffice nearest thereto, is prima facie evidence of the facts contained therein: Polit. Code, sec. 795.

All fines and penalties for non-attendance upon drills, parades, and inspections of the national guard, legally determined and imposed under the provisions of such rules and by-laws, may be collected by action in justice's court, in the name of

the people of the State of California; and the books and records of regiments, battalions, and companies, and the proceedings under which delinquents are fined, are prima facie evidence of the facts therein stated: Polit. Code, sec. 1935.

The secretary of the fire department, or fire company, must keep a record of all certificates of exemption or active membership, the date thereof and to whom issued; and when no seal is provided, similar entries of certificates issued to obtain county clerks' certificates. Every such certificate is prima facie evidence of the facts therein stated: Polit. Code, sec. 3341.

All surveys and maps of boundary lines heretofore legally made and approved are declared valid, and they are prima facie evidence of the establishment of such lines, except so far as they are inconsistent with the provisions of this code: Polit. Code, sec. 3973.

CHAPTER VI.

INDISPENSABLE EVIDENCE.

§ 1967. Indispensable evidence, what.
§ 1968. To prove usage, perjury, and treason, more than one witness required.
§ 1969. Will to be in writing.
§ 1970. How revoked.
§ 1971. Transfer of real property to be in writing.
§ 1972. Last section not to extend to certain cases.
§ 1973. Agreement not in writing, when invalid.
§ 1974. Representation of credit by writing.

§ 1967. The law makes certain evidence necessary to the validity of particular acts, or the proof of particular facts.

§ 1968. Perjury and treason must be proved by testimony of more than one witness. Treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances.

Two witnesses—for probate of lost will: Sec. 1339.

§ 1969. A last will and testament, except a nuncupative will, is invalid, unless it be in writing and executed with such formalities as are required by law. When, therefore, such a will is to be shown, the instrument itself must be produced, or secondary evidence of its contents be given. [Amendment approved March 24, 1874; Amendments 1873-4, 388. In effect July 1st, 1874.]

Lost or destroyed will—probate of: Secs. 1338-1341.

§ 1970. A written will cannot be revoked or altered otherwise than as provided in the Civil Code. [Amendment approved March 24, 1874; Amendments 1873-4, 388. In effect July 1st, 1874.]

Revocation or alteration of will: See Civil Code, sec. 1292 et seq.

§ 1971. No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance, or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

Scope of section—application restricted by Sec. 1972.

Corresponding provision: Civil Code, sec. 1091.

Real property—estate, interest, etc., in, compare sec. 1973, subd. 5.

Trust—Civil Code: Sec. 852.

Grant, etc.: Civ. Code, sec. 1053.

§ 1972. The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of

law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof.

Specific performance: See Civ. Code, sec. 3384 et seq.

§ 1973. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent; evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents:

1. An agreement that by its terms is not to be performed within a year from the making thereof;

2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section twenty-seven hundred and ninety-four of the Civil Code;

3. An agreement made upon consideration of marriage, other than a mutual promise to marry;

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase-money; but when a sale is made by auction, an entry by the auctioneer in his sale-book, at the time of the sale, of the kind of property sold, the terms of sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum;

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

Corresponding provision: Civil Code, sec. 1624.

Note or memorandum—by auctioneer: Sec. 1973, subd. 4.

Corresponding provision; Civil Code, sec. 2793: exception: Civil Code, sec. 2794; executor by: Sec. 1612.

Agreement for sale of goods, etc.—auction sale, entry of: Civil Code, sec. 1798; Political Code, sec. 3292; corresponding provision: Civil Code, sec. 1739, and see Civil Code, sec. 1740.

Parol evidence, when admissible to explain writing: Sec. 1856, ante.

§ 1974. No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by, or in the handwriting of, the party to be charged.

CHAPTER VII.

CONCLUSIVE OR UNANSWERABLE EVIDENCE.

§ 1978. Conclusive or unanswerable evidence.

§ 1978. No evidence is by law made conclusive or unanswerable, unless so declared by this Code.

Estoppel: Secs. 1908, 1962.

TITLE III.

OF THE PRODUCTION OF EVIDENCE.

Chapter I. By whom to be produced. §§ 1981-1982.
II. Means of production. §§ 1985-1997.
III. Manner of production. §§ 2002-2054.

CHAPTER I.

BY WHOM TO BE PRODUCED.

§ 1981. Evidence to be produced, by whom.
§ 1982. Writing altered, who to explain.

§ 1981. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

Burden of proof: Sec. 1869.

§ 1982. The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise.

Printed form—erasure in: 32 Cal. 88; construction of: Sec. 1862.

CHAPTER II.

MEANS OF PRODUCTION.

§ 1985. Subpoena for witness defined.
§ 1986. Subpoena, how issued.
§ 1987. Subpoena, how served.
§ 1988. How, if witness be concealed.
§ 1989. When a witness is compelled to attend.
§ 1990. Person present compelled to testify.
§ 1991. Disobedience, how punished.
§ 1992. Forfeiture therefor.
§ 1993. Warrant may issue to bring witness, when.
§ 1994. Contents of warrant.
§ 1995. If witness be a prisoner, how brought.
§ 1996. On whose motion.
§ 1997. How examined.

§ 1985. The process by which the attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control, which he is bound by law to produce in evidence.

§ 1986. The subpoena is issued as follows:

1. To require attendance before a court, or at the trial of an issue therein, it is issued under the seal of the court before which the attendance is required, or in which the issue is pending;

2. To require attendance out of the court, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this State, it is issued by the judge, justice, or any other officer before whom the attendance is required;

3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other State in the United States, or of any other district or county within this State, or before any officer or officers empowered by the laws of

the United States to take testimony, it may be issued by any judge or justice of the peace in places within their respective jurisdiction; with like power to enforce attendance, and, upon certificate of contumacy to said court, to punish contempt of their process, as such judge or justice could exercise if the subpoena directed the attendance of the witness before their courts in a matter pending therein.

§ 1987. The service of a subpoena is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person.

Costs where subpoena served by person other than sheriff: See post, Appendix, p. 770.

§ 1988. If a witness is concealed in a building or vessel, so as to prevent the service of a subpoena upon him, any court or judge, or any officer issuing a subpoena, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpoena; and the sheriff must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.

§ 1989. A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial.

§ 1990. A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer.

§ 1991. Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint or answer may be stricken out.

Refusal to answer: Sec. 2065.
Contempt: Secs. 1209, 1219.

§ 1992. A witness disobeying a subpoena also forfeits to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.

§ 1993. In case of failure of a witness to attend, the court or officer issuing the subpoena, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required.

§ 1994. Every warrant of commitment, issued by a court or officer pursuant to this chapter, must specify therein, particularly, the cause of the commitment, and if it be for refusing to answer a question, such question must be stated in the warrant. And every warrant to arrest or commit a witness, pursuant to this chapter, must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process issued by the Superior Court.

[Amendment approved April 16, 1880; Amendments 1880, 114. In effect April 16th, 1880.]

§ 1995. If the witness be a prisoner, confined in a jail or prison within this State, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court of officer, for the purpose of being orally examined, may be made as follows:

1. By the court itself in which the action or special proceeding is pending, unless it be a Justice's Court;

2. By a justice of the Supreme Court, or a judge of the Superior Court of the county where the action or proceeding is pending, if pending before a Justice's Court, or before a judge or other person out of court. [Amendment approved April 16, 1880; Amendments 1880, 115. In effect April 16th, 1880.]

§ 1996. Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

§ 1997. If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases his examination, when allowed, must be taken upon deposition.

CHAPTER III.

MANNER OF PRODUCTION.

Article I. Mode of Taking the Testimony of Witnesses.
II. Affidavits.
III. Depositions.
IV. Manner of Taking Depositions out of the State.
V. Manner of Taking Depositions in the State.
VI. General Rules of Examination.

ARTICLE I.

MODE OF TAKING THE TESTIMONY OF WITNESSES.

§ 2002. Testimony, in what mode taken.
§ 2003. Affidavit defined.
§ 2004. A deposition defined.
§ 2005. Oral examination defined.
§ 2006. Deposition, how taken.

§ 2002. The testimony of witnesses is taken in three modes:

1. By affidavit;
2. By deposition;
3. By oral examination.

§ 2003. An affidavit is a written declaration under oath, made without notice to the adverse party.

Affidavits: Sec. 2009 et seq.

§ 2004. A deposition is a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.

Depositions: Secs. 2019-2021; form of: Sec. 2006.

§ 2005. An oral examination is an examination in presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being

heard by the jury or tribunal from the lips of the witness.

General rules of examination: Secs. 2042-2054.

§ 2006. Depositions must be taken in the form of question and answer, and the words of the witness must be written down, unless the parties agree to a different mode.

ARTICLE II.

AFFIDAVITS.

§ 2009. Affidavits and depositions, how taken.
§ 2010. Evidence of publication, what.
§ 2011. Where filed.
§ 2012. Affidavits to be used in this State, before whom may be taken in this State.
§ 2013. If made in another State of the United States, before whom taken.
§ 2014. If made in a foreign country, before whom taken.
§ 2015. Certificate of the clerk, if taken before a judge of a court out of this State.

§ 2009. An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and in any other case expressly permitted by some other provision of this Code.

Affidavit: See secs. 2010, 2011.

§ 2010. Evidence of the publication of a document or notice required by law, or by an order of a court or judge to be published in a newspaper, may be given by the affidavit of the printer of the newspaper, or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when and the paper in which the publication was made.

Affidavit of publication: See sec. 413.

§ **2011.** If such affidavit be made in an action or special proceeding pending in a court, it may be filed with the court or a clerk thereof. If not so made, it may be filed with the clerk of the county where the newspaper is printed. In either case, the original affidavit, or a copy thereof, certified by the judge of the court or clerk having it in custody, is prima facie evidence of the facts stated therein. [Amendment approved March 24, 1874; Amendments 1873-4, p. 388. In effect July 1, 1874.]

§ **2012.** An affidavit to be used before any court, judge, or officer of this State, may be taken before any judge or clerk of any court, or any justice of the peace or notary public in this State.

Persons authorized to take affidavits: Sec. 179, subd. 3.

§ **2013.** An affidavit taken in another State of the United States, to be used in this State, may be taken before a commissioner appointed by the governor of this State to take affidavits and depositions in such other State, or before any notary public in another State, or before any judge or clerk of a court of record having a seal. [Amendment approved March 24, 1874; Amendments 1873-4, p. 389. In effect July 1, 1874.]

§ **2014.** An affidavit taken in a foreign country to be used in this State, must be taken before an embassador, minister, consul, vice-consul, or consular agent of the United States, or before any judge of a court of record having a seal, in such foreign country. [Amendment approved March 24, 1874; Amendments 1873-4, p. 389. In effect July 1, 1874.]

§ **2015.** When an affidavit is taken before a judge of a court in another State, or in a foreign country, the genuineness of the signature of the

judge, the existence of the court and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof.

ARTICLE III.

DEPOSITIONS.

§ 2019. Deposition, when used.
§ 2020. Testimony of a witness out of the State, when taken.
§ 2021. In the State, when taken.

§ 2019. In all cases other than those mentioned in section two thousand and nine, where a written declaration under oath is used, it must be a deposition as prescribed by this Code.

§ 2020. The testimony of a witness out of the State may be taken by deposition, in an action, at any time after the service of the summons or the appearance of the defendant; and, in a special proceeding, at any time after a question of fact has arisen therein.

Manner of taking depositions out of the State: Sec. 2024 et seq.

§ 2021. The testimony of a witness in this State may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases:

1. When the witness is a party to the action or proceeding, or an officer or member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended.

2. When the witness resides out of the county in which his testimony is to be used.

3. When the witness is about to leave the county where the action is to be tried, and will prob-

ably continue absent when the testimony is required.

4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend.

5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required.

6. When the witness is the only one who can establish facts or a fact material to the issue; provided, that the deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause. [Amendment approved March 9, 1878; Amendments 1877-8, p. 112. In effect sixty days after passage.]

Deposition: Mode of taking, sec. 2006; who may take, sec. 179, subd. 3; in this State, manner of taking, sec. 2031 et seq.

ARTICLE IV.

MANNER OF TAKING DEPOSITIONS OUT OF THE STATE.

§ 2024. Testimony of witness out of State taken upon commission issued under seal, upon notice. To whom issue.
§ 2025. Proper interrogatories may be prepared, or may be waived by the parties.
§ 2026. Authorities and duties of commissioner.
§ 2027. Trial, when postponed for reason of nonreturn of commission.
§ 2028. Depositions, by whom used.

§ 2024. The deposition of a witness out of this state may be taken upon a commission issued from the court under the seal of the court, upon an order of the court or a judge or a justice thereof, on the application of either party, upon five days' previous notice to the other. If the court be a justice's court, the commission shall have attached to it a certificate, under seal by the county clerk of such county, to the effect that the

person issuing the same was an acting justice of the peace at the date of the commission. If issued to any place within the United States, it may be directed to a person agreed upon by the parties, or if they do not agree, to any judge or justice of the peace or commissioner selected by the court or judge or justice issuing it. If issued to any country out of the United States, it may be directed to a minister, embassador, consul, vice consul, or consular agent of the United States in such country, or to any person agreed upon by the parties. [Amendment approved March 10, 1891; Stats. 1891, p. 51; in effect immediately.]

§ 2025. Such proper interrogatories, direct and cross, as the respective parties may prepare to be settled if the parties disagree as to their form, by the judge or officer granting the order for the commission, at a day fixed in the order, may be annexed to the commission; or, when the parties agree to that mode, the examination may be without written interrogatories.

Interrogatories—question and answer in depositions: Sec. 2006.

§ 2026. The commission must authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to the interrogatories, or when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the deposition to the court, in a sealed envelope, directed to the clerk or other person designated or agreed upon, and forwarded to him by mail or other usual channel of conveyance.

Certificate: Sec. 2032.

§ 2027. A trial or other proceeding must not be postponed by reason of a commission not returned, except upon evidence, satisfactory to the

court, that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

§ 2028. The deposition mentioned in this article may be used by either party on the trial of other proceeding against any other party giving or receiving the notice, subject to all just exceptions.

Compare with sec. 2034, post.

ARTICLE V.

MANNER OF TAKING DEPOSITIONS IN THIS STATE.

§ 2031. Depositions may be taken before a judge, etc., upon notice to the adverse party.
§ 2032. Manner of taking depositions. May be used by either party on the trial.
§ 2033. When deposition excluded.
§ 2034. A deposition once taken may be read at any time.
§ 2035. Deposition in this State to be used in other States.
§ 2036. How to procure witness upon commission.
§ 2037. How, if no commission.
§ 2038. Deposition, how taken.

§ 2031. Either party may have the deposition taken of a witness in this State, in either of the cases mentioned in section two thousand and twenty-one, before a judge or officer authorized to administer oaths, on serving upon the adverse party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is within that section. Such notice must be at least five days, adding also one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribed a shorter time. When a shorter time is

prescribed, a copy of the order must be served with the notice.

Subpoena issuing to take testimony before notary: See sec. 1986, subd. 2.

§ 2032. Either party may attend the examination and put such questions, direct and cross, as may be proper. The deposition, when completed, must be carefully read to the witness and corrected by him in any particular, if desired; it must then be subscribed by the witness, certified by the judge or officer taking the deposition, inclosed in an envelope or wrapper, sealed and directed to the clerk of the court in which the action is pending, or to such person as the parties in writing may agree upon, and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail, or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial or other proceeding against any party giving or receiving the notice, subject to all legal exceptions; but if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken under subdivisions two, three, and four, of section two thousand and twenty-one, proof must be made at the trial that the witness continues absent or infirm, or is dead. The deposition thus taken may be also read in case of the death of the witness.

Depositions must be in the form of question and answer, unless otherwise agreed: Sec. 2006.

Notice: Sec. 2033.

§ 2033. Notwithstanding the taking of a deposition, it may be excluded from the case upon proof that sufficient notice was not given to the party against whom it is offered to enable him to

attend the taking thereof, or that the taking was not in all respects fair.

§ 2034. When a deposition has been once taken, it may be read by either party in any stage of the same action or proceeding, or in any other action between the same parties upon the same subject, and is then deemed the evidence of the party reading it.

Reading deposition—in another action: Sec. 2028.

§ 2035. Any party to an action or special proceeding in a court, or before a judge, of a sister State, may obtain the testimony of a witness residing in this State, to be used in such action or proceeding, in the cases mentioned in the next two sections.

§ 2036. If a commission to take such testimony has been issued from the court, or a judge thereof, before which such action or proceeding is pending, on producing the commission to a judge of the superior court, with an affidavit satisfactory to him of the materiality of the testimony, he may issue a subpoena to the witness, requiring him to appear and testify before the commissioner named in the commission, at a specified time and place. [Amendment approved April 16, 1880; Amendments 1880, p. 115. In effect April 16, 1880.]

Subpœna: Sec. 1985 et seq.

§ 2037. If a commission has not been issued, and it appear to a judge of the Superior Court, or to a justice of the peace, by affidavit satisfactory to him:

1. That the testimony of the witness is material to either party;

2. That a commission to take the testimony of such witness has not been issued;

3. That, according to the law of the State where the action or special proceeding is pending, the deposition of a witness taken under such circumstances, and before such judge or justice, will be received in the action or proceeding; he must issue his subpoena requiring the witness to appear and testify before him at a specified time and place. [Amendment approved April 16, 1880; Amendments 1880, p. 115. In effect April 16, 1880.]

§ 2038. Upon the appearance of the witness, the judge or justice must cause his testimony to be taken in writing, and must certify and transmit the same to the court or judge before whom the action or proceeding is pending, in such manner as the law of that State requires.

ARTICLE VI.

GENERAL RULES OF EXAMINATION.

§ 2042. Order of proof, how regulated.
§ 2043. Witnesses not under examination may be excluded.
§ 2044. Court may control mode of interrogation.
§ 2045. Direct and cross-examination defined.
§ 2046. Leading question defined.
§ 2047. When witness may refresh memory from notes.
§ 2048. Cross-examination, as to what.
§ 2049. Party producing witness, how far may impeach his credit.
§ 2050. Witness, how examined. When re-examined.
§ 2051. How impeached.
§ 2052. Same.
§ 2053. Evidence of good character, when allowed.
§ 2054. Writing shown to witness may be inspected by adverse party.

§ 2042. The order of proof must be regulated by the sound discretion of the court. Ordinarily, the party beginning the case must exhause his evidence before the other party begins.

Order of proof—controlled by court: Sec. 607.
Reopening case: Sec. 607, subd. 3.
Rebuttal: See sec. 607.

§ 2043. If either party requires it, the judge may exclude from the court-room any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses.

§ 2044. The court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth as may be; but subject to this rule—the parties may put such pertinent and legal questions as they see fit. The court, however, may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt.

Answer of witness: Secs. 2065, 2066.

§ 2045. The examination of a witness by the party producing him is denominated the direct examination; the examination of the same witness, upon the same matter, by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise direct.

§ 2046. A question which suggests to the witness the answer which the examining party desires, is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interests of justice require it.

§ 2047. A witness is allowed to refresh his memory respecting a fact, by anything written

by himself or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing. But in such case, the writing must be produced and may be seen by the adverse party, who may, if he chooses, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution.

Inspection of writing—shown to witness: Sec. 2054.

§ 2048. The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination.

Stopping further testimony: Sec. 2044.

§ 2049. The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section two thousand and fifty-two.

§ 2050. A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the court. Leave is granted or withheld, in the exercise of a sound discretion.

Recalling witness—discretion of court, sec. 607, subd. 3.

§ 2051. A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony.

Compare sec. 1847.

Good character, showing after impeachment: Sec. 2053.

Falsus in uno falsus in omnibus: See sec. 2061.

§ 2052. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

§ 2053. Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character.

§ 2054. Whenever a writing is shown to a witness, it may be inspected by the opposite party, and if proved by the witness must be read to the jury before his testimony is closed, or it cannot be read except on recalling the witness.

Writing to refresh memory: Sec. 2047.

TITLE IV.

OF THE EFFECT OF EVIDENCE.

§ 2061. Jury judges of effect of evidence, but to be instructed on certain points.

§ 2061. The jury, subject to the control of the court, in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions—

1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence.

2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds.

3. That a witness false in one part of his testimony is to be distrusted in others.

4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution.

5. That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond a reasonable doubt.

6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and, therefore,

7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

Province of jury—questions of fact: Sec. 2101.

Credibility of witnesses: See sec. 1847, ante.

Province of court: Compare sec. 608 and sec. 2102.

Admissions: See sec. 1870, subd. 2 and note.

TITLE V.

OF THE RIGHTS AND DUTIES OF WITNESSES.

§ 2064. Witnesses bound to attend when subpoenaed.
§ 2065. Witnesses bound to answer questions.
§ 2066. Right of witnesses to protection.
§ 2067. Witnesses protected from arrest when attending, or going or returning.
§ 2068. Arrest to be made void, and party making arrest liable, etc.
§ 2069. To make affidavit if arrested.
§ 2070. Court to discharge witness from arrest.

§ 2064. A witness, served with a subpoena, must attend at the time appointed, with any papers under his control required by the subpoena, and answer all pertinent and legal questions; and, unless sooner discharged, must remain until the testimony is closed.

Subpoena: Secs. 1985, 1991.

Answering questions: Sec. 2065.

Witnesses—competency, etc., secs. 1878-1884.

Examination, impeachment, refreshing memory, etc.: Secs. 2042-2054.

Power to compel attendance: Secs. 128, 177-178.

Change of place of holding court, effect of: Sec. 143.

Contempt: Secs. 1209, 1219.

§ 2065. A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony.

Contempt: Secs. 1209, 1219.

§ 2066. It is the right of a witness to be protected from irrelevant, improper, or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue.

Compare sec. 2044.

Detention of witness—unreasonable, constitutional prohibition of: See Const. Cal, art. 1, sec. 6, Unreasonable detention forbidden: Const. Cal., art. 1, sec. 6.

§ 2067. Every person who has been, in good faith, served with a subpoena to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom.

§ 2068. The arrest of a witness, contrary to the preceding section, is void, and when willfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the wit-

ness with a subpoena, for the damages sustained by him in consequence of the arrest.

Contempt of court: See secs. 1209-1222.

§ 2069. An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit stating—

1. That he has been served with a subpoena to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued; and,

2. That he has not thus been served by his own procurement, with the intention of avoiding an arrest;

3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpoena.

The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested.

§ 2070. The court or officer issuing the subpoena, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made in violation of section two thousand and sixty-seven. If the court have adjourned before the arrest, or before application for the discharge, a judge of the court may grant the discharge. [Amendment approved April 16, 1880; Amendments 1880, p. 116. In effect April 16, 1880.]

TITLE VI.

OF EVIDENCE IN PARTICULAR CASES, AND MISCELLANEOUS AND GENERAL PROVISIONS.

Chap. I. Evidence in particular cases, §§ 2074-2079.
II. Proceedings to perpetuate testimony, §§ 2083-2089.
III. Administration of oaths and affirmations, §§ 2093-2095.
IV. General provisions, §§ 2101-2104.

CHAPTER I.

EVIDENCE IN PARTICULAR CASES.

§ 2074. An offer equivalent to payment.
§ 2075. Whoever pays entitled to receipt.
§ 2076. Objections to tender must be specified.
§ 2077. Rules for construing description of lands.
§ 2078. Compromise offer of no avail.
§ 2079. In action for divorce, admission not sufficient.

§ 2074. An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.

Offer to compromise: Secs. 997, 2078.

Offer of performance: See Civ. Code, secs. 1485 et seq.

§ 2075. Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery.

Debtor entitled to: Civ. Code, sec. 1499.

§ 2076. The person to whom a tender is made, must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterward.

Objections must be stated: Civ. Code, sec. 1501.

§ 2077. The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first mentioned particulars:

2. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount;

3. Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both;

4. When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title;

5. When tide-water is the boundary the rights of the grantor to ordinary high-water mark are included in the conveyance. When a navigable lake, where there is no tide, is the boundary, the

rights of the grantor to low-water mark, are included in the conveyance;

6. When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise, the map is subordinate to other definite and ascertained particulars. [Amendment approved March 24, 1874; Amendments 1873-4, p. 390. In effect July 1, 1874.]

Description in conveyance—construction of: Sec. 1860.

Construction of instruments, generally: Sec. 1859.

§ **2078.** An offer of compromise is not an admission that anything is due.

Offer to compromise—after suit brought: Sec. 997.

§ **2079.** In an action for divorce on the ground of adultery, a confession of adultery, whether in or out of the pleadings, is not of itself sufficient to justify a judgment of divorce.

Confessions—as evidence generally: Sec. 1870, subd. 2.

CHAPTER II.

PROCEEDINGS TO PERPETUATE TESTIMONY.

§ 2083. Evidence may be perpetuated.
§ 2084. Manner of application for order.
§ 2085. Notice of time and place to be given.
§ 2086. Manner of taking the deposition.
§ 2087. Deposition to be filed.
§ 2088. When the evidence may be produced.
§ 2089. Effect of the deposition.

§ **2083.** The testimony of a witness may be taken and perpetuated as provided in this chapter.

§ 2084. The applicant must produce to a judge of the superior court a petition, verified by the oath of the applicant, stating:

1. That the applicant expects to be a party to an action in a court in this State, and, in such case, the names of the persons whom he expects will be adverse parties; or,

2. That the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. The judge to whom such petition is presented must make an order allowing the examination, and designating the officer before whom the same must be taken, and prescribing the notice to be given, which notice, if the parties expectant are known and reside in this State, must be personally served, and if unknown, such notice must be served on the clerk of the county where the property to be affected by such evidence is situated, or the judge making the order resides, as may be directed by him, and by publication thereof in some newspaper, to be designated by the judge, for the same period required for the publication of summons. The judge must also designate in his order the clerk of the county to whom the deposition must be returned when taken. [Amendment approved April 16, 1880; Amendments 1880, p. 116. In effect April 16, 1880.]

§ 2085. The person appointed by the judge to take the depositions is authorized, if a resident of this State, on receiving a copy of the order of the judge, and of the notice prescribed in the last section, with proof of its personal service or publi-

cation—or, if a resident without the State, on receiving the commission mentioned in the next section, with proof of like service of publication of the notice—to take the deposition of the witness named in the order of the judge, or in the commission, or, if more than one witness is thus named, of such of them as appear before him, at the time designated, and the taking of the same may be continued from time to time. [Amendment approved March 24, 1874; Amendments 1873-4, p. 392. In effect July 1, 1874.]

§ 2086. The examination must be by question and answer, and if the testimony is to be taken in another State, it must be taken upon a commission to be issued by the judge allowing the examination, under the seal of the court of which he is judge, and upon interrogatories, to be settled in the same manner as in cases of depositions taken under commission in pending actions, unless the parties expectant, if known, otherwise agree. If such parties are unknown, notice of the settlement of the interrogatories shall be published in some newspaper for such time as the judge may designate. The deposition, when completed, must be carefully read to and subscribed by the witness, then certified by the officer or person taking the same, and shall then be sealed up and delivered or transmitted to the clerk of the county designated in the order of the judge allowing the examination, who shall file the same when received. The judge allowing the examination shall file with the clerk the order for the examination, the petition on which the same was granted, with proof of service of the order and notice. [Amendment approved March 24, 1874; Amendments 1873-4, p. 392. In effect July 1, 1874.]

§ 2087. The petition and order, and papers filed by the judge as provided in section two thou-

sand and eighty-six, or a certified copy thereof, are prima facie evidence of the facts stated therein to show compliance with the provisions of this chapter. [Amendment approved March 24, 1874; Amendments 1873-4, p. 393. In effect July 1, 1874.]

§ 2088. If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove, or tend to prove, upon proof of the death or insanity of the witnesses, or that they cannot be found, or are unable, by reason of age or other infirmity, to give their testimony, the depositions or copies thereof may be used by either party, subject to all legal objections; but if the parties attended at the examination, no objection to the form of an interrogatory can be made at the trial, unless the same was stated at the examination. [Amendment approved March 24, 1874; Amendments 1873-4, p. 393. In effect July 1, 1874.]

§ 2089. The deposition so taken and read in evidence has the same effect as the oral testimony of the witness, and no other, and every objection to the witness or to the relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if he were examined orally at the trial.

CHAPTER III.

ADMINISTRATION OF OATHS AND AFFIRMATIONS.

§ 2093. Judicial and certain officers authorized to administer oaths.
§ 2094. Form of ordinary oath to a witness.
§ 2095. Form may be varied to suit witness' belief.
§ 2096. Same.
§ 2097. Any person who prefers it may declare or affirm.

§ 2093. Every court, every judge or clerk of any court, every justice and every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations.

Administration of oaths—by whom: Sec. 128, subd. 7; sec. 177, subd. 4; Polit. Code, secs. 1028, 4118, 4103.

§ 2094. An oath, or affirmation, in an action or proceeding, may be administered as follows, the person who swears, or affirms, expressing his assent when addressed in the following form: "You do solemnly swear (or affirm, as the case may be) that the evidence you shall give in this issue (or matter) pending between ——— and ———, shall be the truth, the whole truth, and nothing but the truth, so help you God." [Amendment approved March 24, 1874; Amendments 1873-4, p. 393. In effect July 1, 1874.]

§ 2095. Whenever the court before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing, connected with, or in addition to the usual form of administration, which, in his opinion, is more solemn or obligatory, the court may in its discretion, adopt that mode.

§ 2096. When a person is sworn who believes in any other than the christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such.

§ 2097. Any person who desires it may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting, when addressed in the following form: "You do solemnly affirm (or declare) that," etc., as in section two thousand and ninety-four.

CHAPTER IV.

GENERAL PROVISIONS.

§ 2101. Questions of fact to be decided by the jury, and the evidence addressed to them.
§ 2102. Questions of law addressed to the court.
§ 2103. Questions of fact by court or referee.
§ 2104. Moneys paid into court.

§ 2101. All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this Code. [Amendment approved March 24, 1874; Amendments 1873-4, p. 394. In effect July 1, 1874.]

Compare: Sec. 2061.
Effect of evidence, for jury: Sec. 2061.
Fraudulent intent: Civil Code, sec. 3442.

§ 2102. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this Code, made evidence of a

fact, the court is to declare such knowledge to the jury, who are bound to accept it.

Knowledge of the court—scope of judicial notice: Sec. 1875.

§ 2103. The provisions contained in this part of the Code respecting the evidence on a trial before a jury, are equally applicable on the trial of a question of fact before a court, referee, or other officer.

§ 2104. Whenever moneys are paid into or deposited in court, the same shall be delivered to the clerk in person, or to such of his deputies as shall be specially authorized by his appointment in writing to receive the same. He must, unless otherwise directed by law, deposit it with the county treasurer, to be held by him subject to the order of the court. The treasurer shall keep each fund distinct, and open an account with each. Such appointment shall be filed with the county treasurer, who shall exhibit it, and give to each person applying for the same a certified copy of the same. It shall be in force until a revocation in writing is filed with the county treasurer, who shall thereupon write "revoked," in ink across the face of the appointment. [New section approved March 24, 1874; Amendments 1873-4, p. 394. In effect July 1, 1874.]

Corresponding provision: Sec. 573.

The foregoing new section, and many of the foregoing amendments to the Code of Civil Procedure, are taken from "An act to amend the Code of Civil Procedure," approved March 24, 1874; Amendments 1873-4, 279. The amendatory act contained two other sections, in reference to the effect of the new provisions, as follows:

Repealing clause—Rights preserved.

Sec. 253. All provisions of law inconsistent with the provisions of this act are hereby repealed; but no rights acquired, or proceedings taken under, the provisions repealed shall be impaired, or in any manner affected by this repeal; and whenever a limitation or period of time prescribed by such repealed provisions for acquiring a right or barring a remedy, orfor any other purpose, has begun to run before this act takes effect, and the same or any other limitation is prescribed by this act, the time which shall have run when this act takes effect shall be deemed part of the time prescribed by this act.

Sec. 254. This act takes effect on the first day of July, eighteen hundred and seventy-four.

APPENDIX.

APPEALS.

An Act to provide for the taking of Appeals from Judgments or Orders given or made in the Courts existing on and before the first day of January, eighteen hundred and eighty.

Appeals from judgments existing before January, 1880.

Section 1. In any case where judgment had been rendered, given, or made, or an appealable order had been made or entered, before twelve o'clock noon of the first day of January, eighteen hundred and eighty, in or by any court which was in existence on and before the first day of January, eighteen hundred and eighty, from which any party interested had, at and immediately before the constitution went into effect, a right of appeal to the Supreme Court or the county court, the party so interested shall have the right to appeal from such judgment or order to the present Supreme Court, or to the Superior Court of the county, in the same manner and within the same time after the passage of this act as was before authorized and provided by law for appeal to the then existing Supreme Court or county court; and upon such appeal the appellate court shall have the same jurisdiction to hear and determine the matter or cause as the former court did have in like cases.

Sec. 2. This act shall take effect and be in force from and after its passage. [Approved April 3, 1880; 1880, 24 (Ban. ed. 121).]

BONDS.

An Act to facilitate the giving of Bonds required by Law.

§ 1. Incorporations for giving bonds.
§ 2. When corporation not accepted.
§ 3. Duty of insurance commissioner.

Incorporations for giving bonds.

Section 1. Whenever any person who now or hereafter may be required or permitted by law to make, execute, and give a bond or undertaking, with one or more sureties, conditioned for the faithful performance of any duty, or for the doing or not doing of anything in said bond or undertaking specified, any head of department, board, court, judge, officer, or other person who is now or shall hereafter be required to approve the sufficiency of any such bond or undertaking, or the sureties thereon, may accept as sole and sufficient surety on such bond or undertaking any corporation incorporated under the laws of any State of the United States for the purpose of making or guaranteeing bonds and undertakings required by law, and which shall have complied with all the requirements of the laws of this State regulating the admission of such corporation to transact such business in this State; and all such corporations are hereby vested with full power and authority to make and guarantee such bonds and undertakings, and shall be subject to all the liabilities and entitled to all the rights of natural persons sureties.

When corporation not accepted.

Sec. 2. It is further provided that the guaranty of any such company shall not be accepted by heads of departments or others, as provided in section one of this act, whenever its liabilities shall exceed its assets, as ascertained in the manner provided in section three of this act. .

Duty of insurance commissioner.

Sec. 3. Whenever the liabilities of any such company shall exceed its assets, the insurance commissioner shall require the deficiency to be paid up within sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency, and he shall publish the same once a week for three weeks in a daily San Francisco paper, and thenceforth, and until such deficiency is paid up, such company shall not do business under the provisions of this act. And in estimating the condition of any such company, under the provisions of this act, the commissioner shall allow as assets only such as are authorized under existing laws at the time, and shall charge as liabilities, in addition to eighty per cent of the capital stock, all outstanding indebtedness of the company, and a premium reserve equal to fifty per centum of the premiums charged by said company on all risks then in force. Nothing herein contained shall apply to bonds given in criminal cases.

Sec. 4. This act shall take effect immediately. [Approved March 12, 1885; 1885, 114.]

COSTS.

An Act concerning the Costs in Civil Actions for Serving Summonses and Subpoenas.

Section 1. In all civil actions, when a summons or subpoena is served by a person other than the sheriff, the person so serving shall be allowed by the court issuing the process such sum as the court may think proper, not exceeding the amount allowed sheriffs by law.

Sec. 2. This act shall take effect from and after its passage. [Approved March 10, 1891; Stats. 1891, p. 56.]

Act concerning Costs in Actions of Libel and Slander, see post, p. 86

COURTS.

An Act to provide for the appointment by the Supreme Court of three commissioners, to be known as Commissioners of the Supreme Court, and to appoint a secretary therefor, to relieve said Court from the overburdened condition of its Calendar, and to provide for the compensation of said commissioners and secretary.

§ 1. Supreme court commission
§ 2. Secretary.
§ 3. Appropriation.

Section 1. The Supreme Court of the State of California, immediately upon the taking effect of this act, shall appoint three persons of legal learn-

ing and personal worth as commissioners of said court. It shall be the duty of said commissioners, under such rules and regulations as said court may adopt, to aid and assist the court in the performance of its duties, and in the disposition of the numerous causes now pending in said court undetermined. The said commissioners shall hold office for the term of four years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of said court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the Constitution of the United States and the Constitution of the State of California, and to faithfully discharge the duties of the office of commissioner of the Supreme Court to the best of their ability. The said court shall have power to remove any and all members of said commission at any time by an order entered on the minutes of said court, and all vacancies in said commission shall be filled in like manner.

Sec. 2. Upon the appointment of said commissioners, as in this act provided, said court is hereby authorized to appoint a secretary for such commission, who shall hold office during the pleasure of the court, not to exceed the term of said commission, and who shall have a salary of two hundred dollars per month, payable at the same time and in the same manner as said commission.

Sec. 3. The sum of forty thousand eight hundred dollars is hereby appropriated out of any money that is or may be in the general fund not otherwise appropriated, for the purpose of paying the salary of said commission and secretary, for the thirty-sixth, thirty-seventh, and thirty-eighth fiscal years; and the controller is authorized to

draw monthly warrants upon the State treasury in favor of said commissioners and secretary, in the sum of five hundred dollars for each of said commissioners, and in the sum of two hundred dollars for said secretary. [Approved March 12, 1885.]

An Act to provide for the appointment by the Supreme Court of five Commissioners, to be known as Commissioners of the Supreme Court, and to appoint a Secretary therefor, to relieve said Court from the overburdened condition of its Calendar, and to provide for the compensation of said Commissioners and Secretary, and to appropriate money therefor.

§ 1. Supreme court commission
§ 2. Secretary.
§ 3. Appropriation.

Supreme court commissioners—Salary.

Section 1. The Supreme Court of the State of California shall immediately, upon the expiration of the term of office of the present Supreme Court commissioners, appoint five persons of legal learning and personal worth as commissioners of said court. It shall be the duty of said commissioners, under such rules and regulations as said court may adopt, to assist in the performance of its duties, and in the disposition of the numerous causes now pending in said court undetermined. The said commissioners shall hold office for the term of four years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of said court, payable at the same time and in the same manner. Before entering upon the discharge of their duties, they shall each take an oath to support the con-

stitution of the United States and the constitution of the State of California, and to faithfully discharge the duties of the office of commissioner of the Supreme Court to the best of their ability. The said court shall have power to remove any and all members of said commission at any time by an order entered on the minutes of said court, and all vacancies in said commission shall be filed in like manner.

Secretary.

Sec. 2. Upon the appointment of said commissioners, as in this act provided, said court is hereby authorized to appoint a secretary for such commission, who shall hold office during the pleasure of the court, not to exceed the term of said commission, and who shall have a salary of two hundred dollars per month, payable at the same time and in the same manner as said commission.

Appropriation.

Sec. 3. The sum of sixty-seven thousand seven hundred dollars is hereby appropriated out of any money that is or may be in the State treasury not otherwise appropriated, for the purpose of paying the salary of said commission and secretary for the remainder of the fortieth fiscal year, and for the forty-first and forty-second fiscal years; and the controller is hereby authorized to draw monthly warrants upon the State treasury in favor of said commissioners and secretary in the sum of five hundred dollars for each of said commissioners, and in the sum of two hundred dollars for said secretary.

Sec. 4. This act shall take effect from and after its passage. [Approved February 15, 1889; 1889, 13.]

An Act to provide for the appointment by the Supreme Court of five Commissioners, to be known as Commissioners of the Supreme Court, and to appoint a Secretary therefor, to assist said Court in the performance of its duties and in the disposition of numerous causes pending in said Court, and to provide for the compensation of said Commissioners and Secretary, and to appropriate money therefor.

§ 1. Supreme court commission
§ 2. Secretary.
§ 3. Appropriation.

Section 1. The Supreme Court of the State of California shall, immediately upon the expiration of the term of office of the present Supreme Court commissioners, appoint five persons of legal learning and personal worth as commissioners of said court. It shall be the duty of said commissioners, under such rules and regulations as said court may adopt, to assist in the performance of its duties and in the disposition of the numerous causes pending in said court. The said commissioners shall hold office for the term of four years from and after their appointment, during which time they shall not engage in the practice of law. They shall each receive a salary equal to the salary of a judge of said court, payable at the same time and in the same manner. Before entering upon the discharge of their duties, they shall each take an oath to support the Constitution of the United States and the Constitution of the State of California, and to faithfully discharge the duties of the office of commissioner of the Supreme Court to the best of their ability. The said court shall have power to remove any and all members of said commission at any time, by an order entered

on the minutes of said court, and all vacancies in said commission shall be filled in like manner.

Sec. 2. Upon the appointment of said commissioners, as in this act provided, said court is hereby authorized to appoint a secretary for such commission, who shall hold office during the pleasure of the court, not to exceed the term of said commission, and who shall have a salary of two hundred dollars per month, payable at the same time and in the same manner as said commission, which sum shall be in full compensation for all services rendered by him in the discharge of his duties.

Sec. 3. The sum of sixty-seven thousaid dollars is hereby appropriated out of any money that is or may be in the State treasury not otherwise appropriated, for the purpose of paying the salary of said commission and secretary for the remainder of the forty-fourth fiscal year, and for the forty-fifth and forty-sixth fiscal years; and the controller is hereby authorized to draw monthly warrants upon the State treasury in favor of said commission and secretary, in the sum of five hundred dollars for each of said commissioners, and the sum of two hundred dollars for said secretary.

Sec. 4. This act shall take effect from and after its passage. [Approved January 31, 1893; Stats. 1893, p. 1.]

An Act to provide for the appointment by the Supreme Court of five Commissioners, to be known as Commissioners of the Supreme Court, to appoint a Secretary, and to appropriate money therefor.

§ 1. Supreme court commission
§ 2. Secretary.
§ 3. Appropriation.

Section 1. The Supreme Court of the State of California shall, immediately upon the expiration of the term of office of the present Supreme Court commissioners, appoint five persons of legal learning and personal worth as commissioners of said court. It shall be the duty of said commissioners, under such rules and regulations as said court may adopt, to assist in the performance of its duties, and in the disposition of the numerous causes now pending in said court undetermined. The said commissioners shall hold office for the term of two years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of said court, payable at the same time and in the same manner. Before entering upon the discharge of their duties, they shall each take an oath to support the Constitution of the United States and the Constitution of the State of California, and to faithfully discharge the duties of the office of commissioner of the Supreme Court to the best of their ability. The said court shall have power to remove any and all members of said commission at any time, by an order entered on the minutes of said court, and all vacancies in said commission shall be filled in like manner.

Sec. 2. Upon the appointment of said commis-

sioners, as in this act provided, said court is hereby authorized to appoint a secretary for such commission, who shall hold office during the pleasure of the court, not to exceed the term of said commission, and who shall have a salary of two hundred dollars per month, payable at the same time and in the same manner as said commission.

Sec. 3. The sum of sixty-seven thousand dollars is hereby appropriated out of any money that is, or may be, in the State treasury not otherwise appropriated, for the purpose of paying the salary of said commission and secretary for the remainder of the forty-eighth fiscal year, and for the forty-ninth and fiftieth fiscal years; and the controller is hereby authorized to draw monthly warrants upon the State treasury in favor of said commissioners and secretary in the sum of five hundred dollars for each of said commissioners, and in the sum of two hundred dollars for said secretary.

Sec. 4. This act shall take effect from and after its passage.

[Became a law, under constitutional provision, without governor's approval, March 2, 1897.]

An Act to provide that in all Cities of over ten thousand inhabitants, the Mayor, or other chief executive, shall not be required to act as City Judge,. or ex officio Judge of the City Court, or as Justice of the Peace; to provide for the abolishment of such City Court, and for the transfer of the business and properties of said City Court to the Justice of the Peace of such Cities, and to require such Justice to finish such business, and to repeal all special acts in conflict herewith.

§ 1. Duties of mayor.
§ 2. Transfer of books, etc., to justice.

Defining duties of mayor—Cities over ten thousand inhabitants.

Section 1. In cities of over ten thousand inhabitants, the mayor, or other chief executive thereof, shall not be required to act as justice of the peace, or to hold a city court, or to act as ex officio city judge, or to perform any of the duties of judge of the city courts; and all city courts created by law to be held by such mayor, or other chief executive of such cities, are hereby abolished.

Transfer of books, etc., to justice of the peace.

Sec. 2. All books, dockets, files, documents, papers, and properties of every kind whatsoever belonging to such city court, shall be transferred to the justice of the peace of said city, provided for by law, to hold the police court of such city, or if there be no such police court therein, then to such justice of the peace therein as may be designated for such purpose by the mayor thereof; and such justice of the peace shall have jurisdiction of all matters heretofore brought in such city court, or of which said city court had jurisdiction; and it

shall be his duty to collect all fines and charges required by law to be collected by such city court, and to account for and pay the same over to the treasurer of said city in the same manner, and at the same times and under such terms and conditions, as heretofore required of and by said city court. Said justice of the peace shall complete all such unfinished business as may be transferred to him from said city court under the provisions hereof, in the same manner as heretofore required of said city court.

Sec. 3. The provisions of all acts and every special act of the legislature which conflict in any wise with this act are each and every one hereby repealed.

Sec. 4. This act shall take effect and be in force at once after its passage. [Approved March 8, 1887; 1887, 51.]

An Act to confer upon the Superior Court of each County, and the Judge thereof, the powers heretofore possessed by the District, County, and Probate Courts of such county, and the Judges thereof.

§ 1. New courts.
§ 2. Trials to be continued.

Authority of old courts and judges vested in new courts and judges.

Section 1. In all cases in which, on the first day of January, eighteen hundred and eighty, any authority or jurisdiction was by law vested in the county or probate court of any county, or in the judge thereof, or in any district court of such county, or in the judge thereof, such jurisdiction and authority shall hereafter, while such law con-

tinues in force, be vested in and exercised by the Superior Court of such county, or by a judge thereof.

Trials to be continued in certain cases.

Sec. 2. If any judge of the Superior Court of any county was the judge of the county, probate, or district court in and for said county on the first day of January, eighteen hundred and eighty, and any cause, proceeding, or motion, wholly or partially tried before him remains undecided, the Superior Court, when presided over by him, may resume the consideration or trial of such cause, proceeding, or motion, at the stage where it was suspended in such probate, county, or district court, and may complete such trial or hearing, or determine such cause, motion, or proceeding, as if the same had first been brought or made in such Superior Court.

Sec. 3. This act shall take effect immediately. [Approved April 3, 1880; 1880, 23 (Ban. ed. 115).]

An Act authorizing the judges of the Superior Court in all Counties, and Cities and Counties, having a population of two hundred thousand inhabitants and over, to appoint a Secretary.

Section 1. In all counties, and cities and counties, having a population of two hundred thousand inhabitants and over, the judges of the Superior Court in such counties, and cities and counties, may appoint a secretary, who shall receive a salary of one hundred and fifty ($150) dollars per month, and hold office at their pleasure, and shall perform such duties as may be required of him by the court or the judges thereof. Said salary shall be audited, allowed, and paid out of the general fund of such counties, and cities and counties.

Sec. 2. This act shall take effect from and after its passage. [Approved March 26, 1895; Stats. 1895, 98.]

An Act to provide one additional Judge of the Superior Court of the County of Alameda.

Section 1. Within ten days after the passage of this act the governor shall appoint one additional judge of the Superior Court of the county of Alameda, who shall hold office until the first Monday after the first day of January, A. D. eighteen hundred and ninety-five; and at the next general election one judge of said court, in addition to the present number provided by law for said county, shall be elected, to hold office for the term prescribed by the constitution and by law.

Sec. 2. The salary of said one additional judge shall be the same in amount, and shall be paid at the same time and in the same manner as that of the other judges of the Superior Court of said county now authorized by law.

Sec. 3. This act shall take effect immediately from and after its passage. [Approved February 13, 1893; Stats. 1893, 3.]

An Act to increase the number of Judges of the Superior Court of the County of Fresno, State of California, and for the appointment of an additional Judge.

One additional judge.

Section 1. The number of the judges of the Superior Court of the county of Fresno, State of California, is hereby increased from one to two.

Governor appoint—Term of office.

Sec. 2. Within ten days after the passage of this act, the governor shall appoint one additional judge of the Superior Court of the county of Fresno, State of California, who shall hold office until the first Monday after the first day of January, A. D. eighteen hundred and eighty-nine. At the next general election, one judge of the Superior Court of said county shall be elected in said county, who shall be the successor of the judge appointed hereunder, to hold office for the term prescribed by the constitution and by law.

Salary.

Sec. 3. The salary of said additional judge shall be the same in amount, and paid at the same time and in the same manner, as the salary of the other judge of the Superior Court of said county now authorized by law.

Sec. 4. This act shall take effect and be in force from and after its passage. [Approved March 8, 1887; 1887, 57.]

An Act to facilitate the disposition of business in the Superior Court of Fresno County, by the appointment and election of a third Judge of said Court.

Section 1. The number of judges of the Superior Court of the county of Fresno is hereby increased from two to three, subject to the right of the legislature to repeal this act, as hereinafter provided.

Sec. 2. Within ten days after the passage of this act, the governor shall appoint one additional judge of the Superior Court of the county of Fresno, State of California, who shall hold office until the first Monday after the first day of January,

A. D. eighteen hundred and ninety-five. At the next general election a judge of the Superior Court of said county of Fresno shall be elected in said county to succeed the judge so appointed, and the judge so elected shall hold such office for the term prescribed by the constitution and by law, subject to the right of the legislature of said State, hereby reserved, to abolish the office of said third judge whenever, in the judgment of said legislature, the public interest no longer requires it.

Sec. 3. The salary of said additional judge shall be the same in amount, and shall be paid at the same time and in the same manner, as the salary of the other judges of said court in said county, as now authorized by law.

Sec. 4. This act shall take effect and be in force from and after its passage. [Approved March 10, 1893; Stats. 1893, p. 125.]

An Act to reduce the number of Judges of the Superior Court of the County of Fresno from three to two.

Section 1. The number of judges of the Superior Court of the county of Fresno is hereby reduced from three to two.

Sec. 2. This act shall take effect at the expiration of the term of the judge of said court whose term first expires, and in case a vacancy occur in any term prior to the first Monday after the first day of January, eighteen hundred and ninety-seven, this act shall take effect immediately.

Sec. 3. All acts and parts of acts in conflict with the provisions of this act are hereby repealed. [Approved March 26, 1895; Stats. 1895, p. 156.]

An Act to provide for the appointment and election of one additional Judge for the County of Humboldt.

Section 1. Within ten days after the passage of this act the governor shall appoint one additional judge of the Superior Court of the county of Humboldt, who shall hold office until the first Monday after the first day of January, Anno Domini eighteen hundred and ninety-seven; and at the next general election, and at the general election every six years thereafter, one judge of said court in addition to the present number provided by law for said county shall be elected, to hold office for the term prescribed by the constitution and by law.

Sec. 2. The salary of said additional judge shall be the same in amount, and shall be paid at the same time and in the same manner as that of the other judges of the Superior Court of said county now authorized by law.

Sec. 3. This act shall take effect immediately from and after its passage. [Approved March 8, 1895; Stats. 1895, p. 27.]

An Act to increase the number of Judges of the Superior Court of the County of Los Angeles, State of California, and for the appointment of such additional Judges.

Appointment of superior judges for Los Angeles County.

Section 1. The number of judges of the superior court of the county of Los Angeles, State of California, is hereby increased from four to six.

Sec. 2. Within ten days after the passage of this act, the Governor shall appoint two additional judges of the superior court of the county of Los Angeles, State of California, who shall hold office until the first Monday after the first day of January, A. D. eighteen hundred and ninety-one. At the next general election, two judges of the superior court of said county shall be elected in said county, who shall be successors of the judges appointed hereunder, to hold office for the terms prescribed in the constitution and by law.

Salaries.

Sec. 3. The salaries of such additional judges shall be the same in amount, and be paid in the same manner and at the same time, as the salaries of the other judges of the superior court of said county now authorized by law.

Sec. 4. This act shall take effect and be in force from and after its passage. [Approved March 11, 1889; 1889, 130.]

An Act to increase the number of Judges of the Superior Court of the County of Los Angeles, State of California, and for the appointment of such additional Judges.

Two additional judges of superior court for Los Angeles County.

Section 1. The number of judges of the superior court of the county of Los Angeles, State of California, is hereby increased from two to four.

Governor to appoint, when.

Sec. 2. Within ten days after the passage of this act, the Governor shall appoint two additional judges of the superior court of the county of Los Angeles, State of California, who shall hold office until the first Monday after the first day of

January, A. D. eighteen hundred and eighty-nine. At the next general election, two judges of the superior court of said county shall be elected in said county, who shall be successors of the judges appointed hereunder, to hold office for the term prescribed by the constitution and by law.

Salaries.

Sec. 3. The salaries of said additional judges shall be the same in amount, and be paid at the same time and in the same manner, as the salaries of the other judges of the superior court of said county now authorized by law.

Sec. 4. This act shall take effect and be in force from and after its passage. [Approved February 7, 1887; 1887, 1.]

An Act ot provide an additional Judge of the Superior Court for the County of Mono.

Additional judge of the superior court of Mono county.

Section 1. Within ten days after the passage of this act the Governor shall appoint an additional judge of the superior court of the county of Mono, who shall qualify forthwith, and shall hold said office until the first Monday after the first day of January, A. D. eighteen hundred and eighty-one; and at the next general election a judge of the superior court of said county shall be elected, to hold office for the term of four years from the first Monday after the first day of January, A. D. eighteen hundred and eighty-one.

Salary.

Sec. 2. The salary of said additional judge shall be the same in amount, and shall be paid in the same manner, as that of the judge of the superior court of said county now authorized by law.

Sec. 3. This act shall be in force from and after its approval by the Governor. [Approved April 16, 1880; 1880, 99 (Ban. ed. 335); repealed March 9, 1883; 1883, 62.]

An Act to provide one additional Judge of the Superior Court of the County of Sacramento.

Section 1. The number of judges of the superior court of the county of Sacramento is hereby increased from two to three.

Sec. 2. Within ten days after the passage of this act the Governor shall appoint one additional judge of the superior court of the county of Sacramento, who shall hold office until the first Monday after the first day of January, Anno Domini eighteen hundred and ninety-seven; and at the next general election, to be held in November, Anno Domini eighteen hundred and ninety-six, one judge of said court, in addition to the present number provided by law for said county, shall be elected to hold office for the term prescribed by the constitution and by law.

Sec. 3. The salary of said one additional judge shall be the same in amount, and shall be paid at the same time and in the same manner, as that of the other judges of the superior court of said county now authorized by law.

Sec. 4. This act shall take effect immediately from and after its passage. [Approved March 12, 1895; Stats. 1895, p. 48.]

An Act to provide an additional Judge of the Superior Court of the County of San Bernardino.

Two judges.

Section 1. The number of judges of the Superior court of the county of San Bernardino is hereby increased from one to two.

Governor to appoint, when.

Sec. 2. Within ten days after the passage of this act, the Governor shall appoint an additional judge of the superior court of said county of San Bernardino, who shall hold office until the first Monday after the first day of January, A. D. eighteen hundred and eighty-nine; and at the next general election, a judge of said court of said county shall be elected to hold office for the term prescribed by the constitution and by law.

Salary of.

Sec. 3. The salary of said additional judge shall be the same in amount, and shall be paid at the same time and in the same manner, as that of the other judge of said superior court of said county.

Sec. 4. This act shall take effect and be in force from and after its passage. [Approved March 5, 1887; 1887, 19.]

An Act to increase the number of Judges of the Superior Court of the County of San Diego, State of California, and for the appointment of such additional Judges.

Increase of judges.

Section 1. The number of judges of the superior court of the county of San Diego, State of California, is hereby increased from one (1) to three (3).

Appointment of additional judges.

Sec. 2. Within ten days after the passage of this act, the Governor shall appoint two additional judges of the superior court of the county of San Diego, State of California, who shall hold office until the first Monday after the first day of January, A. D. eighteen hundred and ninety-one. At the next general election, two judges of the super-

ior court of said county shall be elected in said county, who shall be successors of the judges appointed hereunder, to hold office for the term prescribed by the constitution and by law.

Salaries.

Sec. 3. The salaries of said additional judges shall be the same in amount, and be paid at the same time and in the same manner, as the salary of the other judge of the superior court of said county now authorized by law.

Sec. 4. This act shall take effect and be in force from and after its passage. [Approved February 8, 1889; 1889, 5.]

An Act to reduce the number of Judges of the Superior Court of San Diego County to two.

Section 1. The number of superior judges in San Diego county is hereby reduced to two; provided, that such reduction shall not affect any judge who has been elected in said county.

Sec. 2. This act shall take effect immediately. [Approved March 5, 1895; Stats. 1895, 24.]

An Act providing for an additional Superior Judge for the County of San Luis Obispo, and providing for his appointment and salary.

Increase of judges.

Section 1. The number of judges of the superior court of the county of San Luis Obispo, State of California, is hereby increased from one (1) to two (2).

Appointment.

Sec. 2. Within ten days after the passage of this act, the Governor shall appoint one additional

judge of the superior court of the county of San Luis Obispo, State of California, who shall hold office until the first Monday after the first day of January, Anno Domini one thousand eight hundred and ninety-one. At the next general election, one judge of the superior court of said county shall be elected in said county, who shall be the successor of the judge appointed hereunder, to hold office for the term prescribed by the constitution and by law.

Salary.

Sec. 3. Such additional judge of the superior court shall receive such salary as may be allowed by law at the time of his appointment and qualification, which shall be paid in the same manner as the salary of the judge of the superior court of said county is now paid.

Sec. 4. This act shall take effect immediately. [Approved February 8, 1889; 1889, 6.]

An Act providing that the office of the judge of the Superior Court of the County of San Luis Obispo, State of California, now held by Judge D. S. Gregory, shall cease upon a vacancy occurring therein.

Vacancy in office of superior judge, San Luis Obispo County, not to be filled.

Section 1. Upon the office of the judge of the superior court of the county of San Luis Obispo, State of California, now held by Judge D. S. Gregory, becoming vacant, by resignation or otherwise, such office shall cease; and thereafter there shall be but one judge of the superior court in and for the county of San Luis Obispo, State of California.

Sec. 2. This act shall take effect immediately. [Approved March 19, 1889; 1889, 333.]

An Act to increase the number of Judges of the Superior Court of the County of Santa Clara, and to provide for the appointment of an additional Judge.

Section 1. The number of judges of the superior court of the county of Santa Clara is hereby increased from two to three.

Sec. 2. Within ten days after the passage of this act the Governor shall appoint one additional judge of the superior court of the county of Santa Clara, State of California, who shall hold office until the first Monday after the first day of January, Anno Domini eighteen hundred and ninety-nine. At the next general election a judge of the superior court of the said county shall be elected in said county, who shall be the successor of the judge appointed hereunder, to hold office for the term prescribed by the Constitution and by law.

Sec. 3. The salary of said additional judge shall be the same in amount and shall be paid at the same time, and in the same manner as the salary of the other judges, of the superior court of the said county, now authorized by law.

Sec. 4. This act shall take effect and be in force from and after its passage. [Approved February 16, 1897; Stats. 1897, c. 19. In effect immediately.]

An Act providing for the election or appointment of a separate Judge of the Superior Court for each of the Counties of Yuba and Sutter, and fixing and providing for the payment of the salary of each of such Judges.

Section 1. At the general election to be held in the year nineteen hundred and two, and at the

general election every six years thereafter, there shall be elected in the county of Yuba, one judge of the superior court of the said county of Yuba, and in the county of Sutter, one judge of the superior court of the said county of Sutter; each of such judges shall hold such office in and for his respective county for the term prescribed by the Constitution and by law.

Sec. 2. Should a vacancy occur from any cause in the office of judge of the superior courts of the counties of Yuba and Sutter at any time before the general election to be held in the year nineteen hundred and two, the Governor of this State shall immediately appoint one judge of the superior court of the county of Yuba, and one judge of the superior court of the county of Sutter, who shall each hold office until the first Monday after the first day of January next succeeding the first general election held after his appointment, and at such general election, his successor shall be elected to hold office for the term prescribed by the Constitution and by law.

Sec. 3. The judge so elected for the county of Yuba shall receive an annual salary of four thousand dollars, and the judge so elected or appointed for the county of Sutter shall receive an annual salary of four thousand dollars, and such salary shall be paid in each case, one half by the State, and the other half by the county in which such court is situated, respectively, and at the times and in the manner now provided for the payment of such salary in other counties.

Sec. 4. All acts and parts of acts in conflict with this act are hereby repealed.

Sec. 5. This act shall take effect immediately. [Approved March 2, 1897.]

A Bill to increase the number of Judges of the Superior Court of the County of Tulare, and to provide for the appointment of an additional Judge.

Section 1. The number of judges of the superior court of the county of Tulare is hereby increased from one to two.

Sec. 2. Within ten days after the passage of this act, the Governor shall appoint one additional judge of the superior court of the county of Tulare, State of California, who shall hold office until the first Monday after the first day of January, A. D. eighteen hundred and ninety-three. At the next general election, a judge of the superior court of said county, shall be elected in said county, who shall be the successor of the judge appointed hereunder, to hold office for the term prescribed by the Constitution and by law.

Sec. 3. The salary of said additional judge shall be the same in amount, and shall be paid at the same time and in the same manner, as the salary of the other judge of the superior court of said county now authorized by law.

Sec. 4. This act shall take effect and be in force from and after its passage. [Approved March 10, 1891; Stats. 1891, 61.]

An Act to reduce the number of Judges of the Superior Court of the County of Tulare from two to one.

Section 1. The number of judges of the superior court of the county of Tulare, State of California, is hereby reduced from two to one; provided, that the provisions of this section shall not affect either of the present judges of said superior court.

Sec. 2. No election of a judge of the superior court shall be held in said county prior to the general election in the year one thousand eight hundred and ninety-eight, and no vacancy in the office of judge of the superior court of said county occurring on or prior to the first Monday after the first day of January, in the year one thousand eight hundred and ninety-seven shall be filled by appointment or otherwise, unless necessary to maintain one judge of said superior court.

Sec. 3. All acts and parts of acts in conflict with the provisions of this act are hereby repealed. [Approved March 26, 1895; Stats. 1895, 128.]

ESTATES OF DECEASED PERSONS.

§ 1. Right to collect deposit.
§ 2. Power of bank.

An Act to amend an Act entitled "An Act to authorize the Husband or Wife, or next of kin, of a Deceased Person, to collect and receive of any Savings Bank any deposit in such bank, when the same does not exceed the sum of three hundred dollars," approved February 18, 1874. [Stats. 1895, 32.]

Section 1. Section one of said act is hereby amended so as to read as follows:

Section 1. The surviving husband or wife of any deceased person, or if no husband or wife be living, then the next of kin of such decedent, may, without procuring letters of administration, collect of any bank any sum which said deceased may have left on deposit in such bank at the time of his or her death; provided, said deposit shall not exceed the sum of five hundred dollars.

Sec. 2. Section two of said act is hereby amended so as to read as follows:

Section 2. Any bank, upon receiving an affidavit stating that said depositor is dead, and that affiant is the surviving husband or wife, as the case may be, or stating that said decedent left no husband or wife, and that affiant is next of kin of said decedent, and entitled to distribution, and that the whole amount that decedent left on deposit in any and all banks of deposit in this State does not exceed the sum of five hundred dollars, may pay to said affiant any deposit of said decedent, if the same does not exceed the sum of five hundred dollars, and the receipt of such affiant shall be a sufficient acquittance therefor.

Sec. 3. Any person who shall make a false affidavit in regard to the matters specified in this act, shall be deemed to be guilty of perjury.

Sec. 4. This act shall take effect from and after its passage.

[Became a law, under constitutional provision, without Governor's approval, March 8, 1895. The original act was the same except that the amount was $300.]

An Act supplementary to an Act entitled an Act to regulate the Settlement of the Estates of Deceased Persons, passed May first, eighteen hundred and fifty-one.

Section 1. When it shall appear, upon the settlement of the accounts of any executor or administrator, that debts against the deceased have been paid without the affidavit and allowance prescribed by section one hundred and thirty-one of the act to which this act is supplementary, and it shall be proven by competent evidence to the satisfaction of the probate courts that such debts were

justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments of set-offs, and that the estate is solvent, it shall be the duty of the said court to allow the said sums so paid in the settlement of said accounts.

Sec. 2. This act shall go into effect from and after its passage. [Approved March 30, 1872; 1871-2, 696.]

An Act for the Relief of Insolvent Debtors, for the protection of Creditors, and for the punishment of Fraudulent Debtors.

[Approved March 26, 1895; in effect sixty days after approval; Stats. 1895, 131.]

§ 1. Who may be discharged.
§ 2. Voluntary insolvent—Petition.
§ 3. Schedule.
§ 4. What to contain.
§ 5. Verification.
§ 6. Order declaring insolvent—Publication—Receiver.
§ 7. Publication—Service—Costs.
§ 8. Voting—Exceptions to claims—Mortgage claimant.
§ 9. Involuntary—Petition—Bond.
§ 10. Order to show cause.
§ 11. Service—Publication.
§ 12. Demurrer—Answer—Trial.
§ 13. Order—Schedule—Verification—Assignee.
§ 14. Publication of order—Service—Costs.
§ 15. Trial.
§ 16. When service cannot be made—Inventory.
§ 17. Other property—Appeal.
§ 18. Improper affidavits and bonds.
§ 19. Assignees, election of and bond.
§ 20. Failure to elect.
§ 21. Clerk to convey to assignee—Attachments to [illegible] ments.
§ 22. Assignee may recover all of estate.
§ 23. Assignment to be recorded.
§ 24. Assignee may resign.
§ 25. Power of assignee.
§ 26. Insolvent to deliver property to court.
§ 27. Penalty.
§ 28. Proceedings.
§ 29. Converting estate into money.
§ 30. Perishable property.
§ 31. Rights of action.
§ 32. Expenses.
§ 33. Account of assignee.
§ 34. Account on motion of creditors.
§ 35. Pro rata dividends.
§ 36. Dividends.
§ 37. Refusal to render account.

§ 38. Preparatory to final account.
§ 39. Partnerships.
§ 40. Corporations.
§ 41. Proof of debts.
§ 42. Chattels wrongfully taken.
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ARTICLE I.

General Subject of the Act.

1. Every insolvent debtor may, upon compliance with the provisions of this act, be discharged from his debts and liabilities. This act shall be known and may be cited as the Insolvent Act of eighteen hundred and ninety-five.

ARTICLE II.

Voluntary Insolvency.

2. An insolvent debtor, owing debts exceeding in amount the sum of three hundred dollars, may

apply by petition to the superior court of the county, or city and county, in which he has resided for six months next preceding the filing of his petition to be discharged from his debts and liabilities. In his petition he shall set forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain a discharge from his debts and liabilities, and shall annex thereto a schedule and inventory and valuation, in compliance with the provisions of this act. The filing of such petition shall be an act of insolvency, and thereupon such petitioner shall be adjudged an insolvent debtor.

3. Said schedule must contain a full and true statement of all his debts and liabilities, exhibiting to the best of his knowledge and belief to whom said debts or liabilities are due, the place of residence of his creditors, and the sum due each; the nature of the indebtedness or demand, whether founded on written security, obligation, contract, or otherwise; the true cause and consideration thereof, and the time and place when and where such indebtedness accrued, and a statement of any existing pledge, lien, mortgage, judgment, or other security for the payment of the same; also, an outline of the facts touching any liability, directly or indirectly, in the nature of any right of action against the insolvent by any one.

4. Said inventory must contain an accurate description of all the estate, both real and personal, of the petitioner, including his homestead, if any, and all property exempt by law from execution, and where the same is situated, and all encumbrances thereon; also, an outline of the facts touching any right of action in favor of the insolvent against any one.

5. The petition, schedule, and inventory must

be verified by the affidavit of the petitioner annexed thereto, and shall be in form substantially as follows: I, ——, do solemnly swear that the schedule and inventory now delivered by me contain a full, perfect, and true discovery of all the estate, real, personal, and mixed, goods and effects, to me in any way belonging; all such debts as are to me owing, or to any person or persons in trust for me, and all securities and contracts, and contracts whereby any money may hereafter become payable, or any benefit or advantage accrue to me or to my use, or to any other person or persons in trust for me; that the schedule and inventory, respectively, contain a clear outline of the facts touching any known right of action against me by any one, and an outline of the facts touching all rights of action in my favor against any one; that I have no lands, money, stock, or estate, reversion, or expectancy, besides that set forth in my schedule and inventory; that I have in no instance created or acknowledged a debt for a greater sum than I honestly and truly owe; that I have not, directly or indirectly, sold, or otherwise disposed of, or concealed, any part of my property, effects, or contracts; that I have not in any way compounded with my creditors whereby to secure the same, or to receive or to expect any profit or advantage therefrom, or to defraud or deceive any creditor to whom I am indebted in any manner. So help me God.

6. Upon receiving and filing such petition, schedule, and inventory, the court shall make an order declaring the petitioner insolvent, and directing the Sheriff of the county, or city and county, to take possession of all the estate, real and personal, of the debtor, except such as may be by law exempt from execution, and of all his deeds, vouchers, books of account, and papers, and to keep the same safely until the appointment of an assignee. Said order shall further forbid the pay-

ment of any debts and the delivery of any property belonging to such debtor, to him, or for his use, and the transfer of any property by him; and shall further appoint a time and place for a meeting of the creditors, to prove their debts and choose an assignee of the estate, and shall designate a newspaper of general circulation published in the county, or city and county, in which the petition is filed, if there be one, and if there be none, in a newspaper published nearest to such county, or city and county, in which publication of such order shall be made. The time appointed for the election of an assignee shall not be less than eight nor more than ten days from the date of the order of adjudication. Upon the granting of said order, all proceedings against the said insolvent shall be stayed. When a receiver is appointed or an assignee chosen, as provided for in this act, the Sheriff shall thereupon deliver to such receiver or assignee, as the case may be, all the property and assets of the insolvent which have come into his possession, and shall be allowed and paid as compensation for his services the same expenses and fees as would by law be collectible if the property had been levied upon and safely kept under attachment.

7. A copy of said order shall immediately be published by the clerk of said court, in a newspaper designated therein, as often as said newspaper is printed before the meeting of creditors, and be served by the clerk forthwith by the United States mail, postage prepaid, or personally, on all creditors named in the schedule. There shall be deposited in addition to the usual cost of commencing such proceedings a sum of money sufficient to defray the cost of the publication ordered by the court, and ten cents for each copy, to be mailed to or served on the creditors, which latter sum is hereby constituted the legal fee of the clerk for the mailing or service required in this section.

8. No claim shall be entitled to a vote for the election of an assignee, unless such claim shall be placed on file in the office of the clerk of the court in which the proceedings are pending, at least two days prior to the time appointed for the election of an assignee. All claims shall be established by a statement, showing the amount and nature of the claim, and security, if any; such statement to be verified by the claimant, his agent or attorney; provided, no claim barred by the statute of limitations shall be proved or allowed against the estate of an insolvent debtor for any purpose. Any person interested in the estate of the insolvent may file exceptions to the legality or good faith of any claim, by setting forth specifically in writing his interest in the estate, and the grounds of his objection to such claim; such specifications of exceptions to be verified by the affidavit of the party objecting, his agent or attorney, setting out among other things that such exceptions are not made for the purpose of delay, or otherwise than in good faith in the best interest of said estate. Such exceptions to be filed with the clerk of the court at least one day before the time appointed for the election of an assignee; and such exceptions shall be heard and disposed of by the court, on affidavit or other evidence, in a summary manner, before the election of an assignee. But the decision of the court upon the exceptions as to whether the claimant shall be entitled to vote for an assignee shall not be conclusive upon the right of the party to participate in the assets of the insolvent, the enforcement of such right being subject to the laws of the State touching the establishment of claims against the estates of insolvents in case of dispute. No creditor or claimant, who holds any mortgage, pledge, or lien of any kind whatever, as security for the payment of his claim, shall be permitted to vote any part of his secured claim in the election of assignee, unless

he shall first have the value of such security fixed as provided in section forty-eight of this act, or surrender to the Sheriff or receiver of the estate of the insolvent, if any receiver, all such property so mortgaged or pledged, or assign such lien to such receiver or sheriff; such surrender or assignment of security or lien to be for the benefit of all creditors of the estate of the insolvent. The value of such security, if fixed by the court, shall be so fixed at least one day before the day appointed for the election of an assignee; in which event the claimant may prove his demand, as provided in this section, for any unsecured balance subject to the same exceptions as all other claims. [Amendment approved February 26, 1897; Stats. 1897, c. 38.]

ARTICLE III.

Involuntary Insolvency.

9. An adjudication of insolvency may be made on the petition of five or more creditors, residents of this State, whose debts or demands accrued in this State, and amount in the aggregate to not less than five hundred dollars; provided, that said creditors, or either of them, have not become creditors by assignment within thirty days prior to the filing of said petition. Such petition must be filed in the superior court of the county, or city and county, in which the debtor resides or has his place of business, and must be verified by at least three of the petitioners, setting forth that such person is about to depart from this State, with intent to defraud his creditors, or being absent from the State with such intent, remains absent; or conceals himself to avoid the service of legal process; or conceals, or is removing, any of his property to avoid its being attached or taken on legal process; or being insolvent, has suffered his property to remain under attachment; or legal process, for three days; or has confessed or offered to allow judgment in

favor of any creditors; or willfully suffered judgment to be taken against him by default; or has suffered or procured his property to be taken on legal process, with intent to give a preference to one or more of his creditors; or has made any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, with intent to delay, defraud, or hinder his creditors; or in contemplation of insolvency, has made any payment, gift, grant, sale, conveyance or transfer of his estate, property, rights, or credits; or has been arrested and held in custody by virtue of any civil process of court founded on any debt or demand; and such process remains in force, and not discharged by payment, or otherwise, for a period of three days; or being a merchant or tradesman, has stopped or suspended, and not resumed payment within a period of forty days after the maturity of any written acknowledgment of indebtedness, unless the party holding such acknowledgment has, in writing, waived the right to proceed under this subdivision; or being a bank or banker, agent, broker, factor, or commission merchant, has failed for forty days to pay any moneys deposited with or received by him in a fiduciary capacity, upon demand of payment, excepting savings and loan banks, or associations who loan the money of their stockholders and depositors on real estate, and provide in their by-laws for the repayment of such deposits. The petitioners may, from time to time, amend and correct the petition, so that the same shall conform to the facts by leave of the court before which the proceedings are pending, such amendment or amendments to relate back to and be received as embraced in the original petition; but nothing in this section shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith upon a security taken in good faith on the occasion of the making of such loan. The said petition shall be accompanied

by a bond with two sureties in the penal sum of at least five hundred dollars, conditioned that if the debtor should not be declared an insolvent, the petitioners will pay all costs and damages, including a reasonable attorney's fee, that the debtor may sustain by reason of the filing of said petition. The court may, upon motion, direct the filing of an additional bond with different sureties, when deemed necessary.

10. Upon the filing of such creditors' petition, the court, or a judge thereof, shall issue an order requiring such debtor to show cause, at a time and place to be fixed by said court, or judge, why he should not be adjudged an insolvent debtor, and at the same time, or thereafter, upon good cause shown therefor, said court, or judge, may make an order forbidding the payment of any debts, and the delivery of any property belonging to such debtor to him or for his use, or the transfer of any property by him.

11. A copy of said petition, with a copy of the order to show cause, shall be served on the debtor, in the same manner as is provided by law for the service of summons in civil actions, but such service shall be made at least five days before the time fixed for the hearing; provided, that if, for any reason, the service is not made, the order may be renewed, and the time and place of hearing changed by supplemental order of the court; provided, however, that where the debtor or debtors on whom service is to be made reside out of this State; or has departed from the State; or cannot, after due diligence, be found within the State; or conceals himself to avoid the service of the order to show cause, or any other process or orders in the matter; or is a foreign corporation, having no managing or business agent, cashier, or secretary within the State, upon whom service can be made, and such facts are shown to the court, or a judge thereof, by affidavit such court or judge thereof

shall make an order that the service of such order, or other process, be made by publication, in the same manner, and with the same effect, as service of summons by publication in ordinary civil actions.

12. At the time fixed for the hearing of said order to show cause, or such other time as it may be adjourned to, the debtor may demur to the petition for the same causes as is provided for demurrer in other cases by the Code of Civil Procedure. If the demurrer be overruled, the debtor shall have five days thereafter in which to answer the petition. If the debtor answer the petition, such answer shall contain a specific denial of the material allegations of the petition controverted by him, and shall be verified in the same manner as pleadings in civil actions; and the issues raised thereon, may be tried with or without a jury, according to the practice provided by law for the trial of civil actions.

13. If the respondent shall make default, or if after a trial, the issues are found in favor of the petitioners, the court shall make an order adjudging that said respondent is, and was at the time of filing the petition, an insolvent debtor, and that the debtor was guilty of the acts and things charged in the petition, or such of those acts and charges as the court may find to be true; and shall require said debtor, within such time as the court may designate, not to exceed three days, to file in court the schedule and inventory provided for in sections three and four of this act, duly verified as required of a petitioning debtor; provided, that in the affidavit of the insolvent touching his property and its disposition he shall not be required to swear that he has not made any fraudulent preference, or committed any other act in conflict with the provisions of this act; but he may do so if he desires. Said order shall further direct the sheriff of the county, or city and county, where the

insolvency petition is filed, or the receiver, if one has been theretofore appointed, to take possession of all the estate, real and personal, of the debtor, except such as may be by law exempt from execution and of all his deeds, vouchers, books of account, and papers, and to keep the same safely until the appointment of an assignee. Said order shall further forbid the payment of any debts, and the delivery of any property belonging to such debtor, to him, or for his use, and the transfer of any property by him; and shall further appoint a time and place for a meeting of the creditors, to prove their debts, and choose an assignee of the estate, and shall designate a newspaper of general circulation published in the county, or city and county, in which the petition is filed, if there be one; and if there be none, in a newspaper published nearest to such county, or city and county, in which publication of said order shall be made. The time appointed for the election of an assignee shall not be less than eight nor more than ten days from the date of the order of adjudication. Upon granting of said order, all proceedings against the said insolvent shall be stayed. When a receiver is appointed subsequent to adjudication, or an assignee is chosen as provided for in this act, the sheriff shall thereupon deliver to such receiver or assignee, as the case may be, all the property and assets of the insolvent which have come into his possession, and shall be allowed and paid as compensation for his service the same expenses and fees as would by law be collectible if the property had been levied upon and safely kept under attachment.

14. A copy of the order provided for in section thirteen of this act, shall immediately be published by the clerk of said court in the newspaper designated therein, as often as such newspaper is printed before the meeting of creditors, and upon the filing, at any time before the date set for such

meeting, of the schedule required by said section thirteen, a copy of said order shall be served by the clerk forthwith by United States mail, postage prepaid, or personally, on all creditors named in said schedule. If said schedule is not filed prior to the day fixed for the election of an assignee, publication of said order as herein required shall be of itself sufficient notice to the creditors of the time and place appointed for the election of an assignee. No order of adjudication upon creditors' petition shall be entered unless there be first deposited, in addition to the usual cost of commencing said proceedings, a sum of money sufficient to defray the cost of the publication ordered by the court, and the further sum of five dollars, which is hereby constituted the legal fee of the clerk for the mailing or service of notice to creditors required in this section.

15. If, upon such hearing or trial, the issues are found in favor of the respondent, the proceedings shall be dismissed, and the respondent shall recover costs from the petitioning creditors in the same manner as on the final judgment in civil actions.

16. In all cases where the debtor resides out of this State, or has departed from the State; or cannot, after due diligence, be found within the State; or conceals himself to avoid service of the order to show cause, or any other preliminary process or orders in the matter; or is a foreign corporation, having no managing or business agent, cashier, or secretary within the State upon whom service of orders and process can be made, and it therefore becomes necessary to obtain service of process and order to show cause, as provided in section eleven of this act, then the petitioning creditors, upon submitting the affidavits requisite to procure an order of publication, and presenting a bond in double the amount of the aggregate sum of their claims against the debtor, shall be entitled to an

order of court directing the sheriff of the county, or city and county, in which the matter is pending, to take into his custody a sufficient amount of property of the debtor to satisfy the demands of the petitioning creditors, and the costs of the proceedings. Upon receiving such order of the court to take into custody property of the debtor, it shall be the duty of the sheriff to take possession of the property and effects of the debtor, not exempt from execution, to an extent sufficient to cover the amount provided for, and to prepare within three days from the time of taking such possession, a complete inventory of all the property so taken, and to return it to the court as soon as completed. The time for taking the inventory and making return thereof, may be extended for good cause shown to the court, or a judge thereof. The sheriff shall also prepare a schedule of the names and residences of the creditors, and the amount due to each, from the books of the debtor, or from such other papers or data of the debtor available that may come to his possession, and shall file such schedule list of creditors and inventory with the clerk of the court.

17. In all cases where property is taken into the custody of the sheriff, as provided in the preceding section, if the property taken into custody by the sheriff does not embrace all the property and effects of the debtor not exempt from execution, any other creditor or creditors of the debtor, upon giving bond in double the amount of their claims, singly or jointly, shall be entitled to similar orders, and to like action, by the sheriff, until all claims be provided for, if there be sufficient property or effects. All property taken into custody by the sheriff by virtue of the giving of any such bonds shall be held by him for the benefit of all creditors of the debtor whose claims shall be duly proved, and as provided in this act. The

bonds provided for in this and the preceding section to procure the order for custody of the property and effects of the debtor, shall be conditioned that if, upon final hearing of the petition in insolvency, the court shall find in favor of the petitioners, such bonds and all of them shall be void; if the decision be in favor of the debtor, the proceedings shall be dismissed, and the debtor, his heirs, administrators, executors, or assigns, shall be entitled to recover such sum of money as shall be sufficient to cover the damages sustained by him, not to exceed the amount of the respective bonds, in any court having jurisdiction of the subject and the parties; provided, that if either the petitioners or the debtor shall appeal from the decision of the court, upon final hearing of the petition the appellant shall be required to give bond to the successful party in a sum double the amount of the value of the property in controversy, and for the costs of the proceedings. Any person interested in the estate may except to the sufficiency of the sureties on such bond, or bonds. When excepted to, the petitioner's sureties, upon notice to the person excepting of not less than two nor more than five days, must justify before a judge or county clerk in the same manner as upon bail on arrest; and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the clerk or judge shall issue an order vacating the order to take the property of the debtor into the custody of the sheriff.

18. If in any case, proper affidavits and bonds are presented to the court, or a judge thereof, asking for and obtaining an order of publication, and an order for the custody of the property of the debtor, as provided in sections sixteen and seventeen of this act, and thereafter the petitioners shall make it appear satisfactory to the court, or a judge thereof, that the interest of the parties to the proceedings will be subserved by a sale

thereof, the court may order such property to be sold, in the same manner as property is sold under execution, the proceeds to be deposited in the court, to abide the result of the proceedings.

ARTICLE IV.

Assignees.

19. At a meeting of the creditors in open court, those being entitled to vote, as provided by section eight, shall proceed to the election of one assignee. In electing an assignee, the opinion of the majority in amount of claims shall prevail. The clerk of the court shall keep a minute of the deliberations of said creditors, and of the election and appointment of an assignee, and enter the same upon the records of the court. The assignee shall file, within five days, unless the time be extended by the court, with the clerk, a bond, in an amount to be fixed by the court, to the State of California, with two or more sufficient sureties, approved by the court, and conditioned for the faithful performance of the duties devolving upon him. The bond shall not be void upon the first recovery, but may be sued upon from time to time by any creditor aggrieved, in his own name, until the whole penalty be exhausted. The sureties on such bond may be required to justify upon the application of any party interested, in the same manner as bail upon arrest in civil cases.

20. If, on the day appointed for the meeting, creditors do not attend, or refuse to elect an assignee; or if, after election, the assignee shall fail to qualify within the proper time, or if a vacancy occurs by death or otherwise, it shall be lawful for the court to appoint an assignee and fix the amount of his bond.

21. As soon as an assignee is elected or appointed and qualified, the clerk of the court shall, by an instrument under his hand and seal of the court, assign and convey to the assignee all the estate,

real and personal, of the debtor with all his deeds, books and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in insolvency, and shall relate back to the acts upon which the adjudication was founded, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process, as the property of the debtor, and shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings. Such assignment shall operate to vest in the assignee all of the estate of the insolvent debtor not exempt by law from execution. Whenever such assignment shall dissolve an attachment as herein provided, it shall also vacate any judgment made or entered, and dissolve and set aside any execution levied in any action or proceeding against the debtor commenced subsequently to the action in which the attachment is dissolved.

22. The assignee shall have the right to recover all the estate, debts, and effects of said insolvent. If, at the time of the commencement of proceedings in insolvency an action is pending in the name of the debtor, for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall be allowed and admitted to prosecute the action, in like manner and with like effect as if it had been originally commenced by him. If there are any rights of action in favor of the insolvent for damages, on any account, for which an action is not pending, the assignee shall have the right to prosecute the same with the same effect as the insolvent might have done himself if no proceedings in insolvency had been instituted. If any action or proceeding at law, or in equity, in which the insolvent is defendant is pending at the time of the adjudication, the assignee may defend the same,

in the same manner and with like effect as it might have been defended by the insolvent. In suit prosecuted or defended by the assignee, a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue or defend.

23. The assignee shall, within one month after the making of the assignment to him, cause the same to be recorded in every county, or city and county, within this State, where any lands owned by the debtor are situated, and the record of such assignment, or a duly certified copy thereof, shall be conclusive evidence thereof in all courts. If the schedule and inventory required by this act have not been filed by the debtor the assignee shall within one month after his election, prepare and file such schedule and inventory from the best information he can obtain, and shall thereupon serve notice by United States mail, postage prepaid, or personally, on all creditors named in such schedule, whose claims have not been filed, to forthwith prove their demands.

24. Any assignee may at any time, by writing filed in court, resign his appointment, having first settled his accounts, and delivered up all the estate to such successor as the court shall appoint; provided, that if, in the discretion of the court, the circumstances of the case require it, upon good cause being shown, the court may, at any time before such settlement of account and delivery of the estate shall have been completed, revoke the appointment of such assignee and appoint another in his stead. The liability of the outgoing assignee, or of the sureties on his bond, shall not be in any manner discharged, released, or affected by such appointment of another in his stead.

25. The said assignee shall have power:

1. To sue in his own name and recover all the estate, debts, and things in action, belonging or due to such debtor, and no set-off or counter-claim

shall be allowed in any such suit for any debt, unless it was owing to such creditor by such debtor at the time of the adjudication of insolvency.

2. To take into his possession all the estate of such debtor except property exempt by law from execution, whether attached or delivered to him, or afterward discovered and all books, vouchers, evidence of indebtedness and securities belonging to the same.

3. In case of a nonresident absconding or concealed debtor, to demand and receive of every sheriff who shall have attached any of the property of such debtor, or who shall have in his possession any moneys arising from the sale of such property, all such property and moneys, on paying him his lawful costs and charges for attaching and keeping the same.

4. From time to time to sell at public auction all the estate, real and personal, vested in him as such assignee, which shall come to his possession and as ordered by the court.

5. On such sales to execute the necessary conveyances and bills of sale.

6. To redeem all valid mortgages and conditional contracts, and all valid pledges of personal property, and to satisfy any judgments which may be an encumbrance on any property sold by him, or to sell such property, subject to such mortgage, contracts, pledges, or judgments.

7. To settle all matters and accounts between such debtor and his debtors, subject to the approval of the court.

8. Under the order of the court appointing him, to compound with any person indebted to such debtor, and thereupon to discharge all demands against such person.

9. To have and recover from any person receiving a conveyance, gift, transfer, payment, or assignment, made contrary to any provision of this act, the property thereby transferred or assigned;

or in case a redelivery of the property cannot be had, to recover the value thereof, with damages for the detention.

26. The insolvent shall, either before or on the day appointed for the meeting of creditors, deliver to the court all the commercial or account books he may have kept, which books shall be deposited in the clerk's office of said court. Said insolvent shall also deliver to the court at the same time, all vouchers, notes, bonds, bills, securities, or other evidences of debt, in any manner relating to or having any bearing upon or connection with the property surrendered by said debtor, and all such papers or securities shall be deposited in the clerk's office of said court, and the clerk shall hand them over, together with the books of the insolvent, to the assignee who may be appointed.

27. If any person, before the assignment is made, having notice of the commencement of the proceedings in insolvency, or having reason to believe that insolvency proceedings are about to be commenced, embezzles or disposes of any of the moneys, goods, chattels, or effects of the insolvent, he is chargeable therewith, and liable to an action by the assignee for double the value of the property so embezzled or disposed of, to be recovered for the benefit of the estate.

28. The same penalties, forfeitures, and proceedings by citation, examination and commitment shall apply on behalf of an assignee against persons suspected of having concealed, embezzled, conveyed away, or disposed of any property of the debtor, or of having possession or knowledge of any deeds, conveyances, bonds, contracts, or other writings which relate to any interest of the debtor in any real or personal estate as provided in the case of estates of deceased persons in sections one thousand four hundred and fifty-nine, one thousand four hundred and sixty, and one thousand four hundred and sixty-one of the Code of Civil Procedure.

29. The assignee shall as speedily as possible convert the estate, real and personal, into money. He shall keep a regular account of all moneys received by him as assignee, to which every creditor or other person interested therein may, at all reasonable times, have access. No private sale of any property of the estate of an insolvent debtor shall be valid unless made under the order of the court, upon a petition in writing, which shall set forth the facts showing the sale to be necessary. Upon filing the petition, notice of at least ten days shall be given by publication and mailing, in the same manner as is provided in section seven of this act. If it appears that a private sale is for the best interests of the estate, the court shall order it to be made.

30. In all cases where there has been personal service of the order to show cause, or voluntary appearance after order of publication, when it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or is liable to deteriorate in value, or is disproportionately expensive to keep, the court may order the same to be sold in such manner as may be deemed most expedient, under the direction of the sheriff, receiver, or assignee, as the case may be, who shall hold the funds received in place of the property sold until further order of the court.

31. Outstanding debts, or other property due or belonging to the estate, which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, may be sold and assigned in like manner as the remainder of the estate. If there are any rights of action for damages in favor of the insolvent prior to the commencement of the insolvency proceedings, the same may, with the approval of the court, be compromised.

32. Assignees shall be allowed all necessary ex-

penses in the care, management, and settlement of the estate, and shall be entitled to charge and receive for their services commissions upon all sums of money coming to their hands and accounted for by them, as follows: For the first thousand dollars, at the rate of seven per cent; for all above that sum and not exceeding ten thousand dollars, at the rate of five per cent; and for all above that sum, at the rate of four per cent; provided, however, that if the person acting as assignee was receiver of the property of the estate pending the election of an assignee, any compensation allowed him as such receiver shall be deducted from the compensation to which he otherwise would be entitled as such assignee.

33. At the expiration of three months from the appointment of the assignee in any case, or as much earlier as the court may direct, a time and place shall be fixed by the court at which the assignee shall exhibit to the court and to the creditors, and file just and true accounts of all his receipts and payments, verified by his oath, and a statement of the property outstanding, specifying the cause of its outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his possession, and shall accompany the same with an affidavit that notice by mail has been given to all creditors named in the schedule filed by the debtor or the assignee that said accounts will be heard at a time specified in such notice, which time shall not be less than ten nor more than fifteen days from the filing of such accounts. At the hearing the court shall audit the accounts, and any person interested may appear and file exceptions thereto and contest the same, and thereupon the court may order a dividend paid to those creditors whose claims have been proven and allowed. Thereafter, further accounts, statements, and dividends shall be made in like manner as often as occasion requires; provided, how-

ever, that it shall be the duty of the assignee to file his final account within one year from the date of the order of adjudication, unless the court, after notice to creditors, shall grant further time, upon a satisfactory showing that great loss and waste would result to the estate by reason of the conversion of the property into money within said time, or that it has been impossible to do so by reason of litigation.

34. The court shall at any time, upon the motion of any two or more creditors, require the assignee to file his account in the manner and upon giving the notice specified in the preceding section, and if he has funds subject to distribution, he shall be required to distribute them without delay.

35. All creditors whose debts are duly proved and allowed shall be entitled to share in the property and estate pro rata without priority or preference whatever, other than as provided in this act and in section one thousand two hundred and four of the Code of Civil Procedure; provided, that any debt proved by any person liable as bail, surety, guarantor, or otherwise, for the debtor, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable; and the share to which such debt would be entitled may be paid into court, or otherwise held, for the benefit of the party entitled thereto, as the court may direct.

36. Whenever any dividend has been duly declared, the distribution of it shall not be stayed or affected by reason of debts being subsequently proved, but the creditors, proving such debts shall be entitled to a dividend equal to those already received by the other creditors, before any further dividend is made to the latter; provided, the failure to prove such claim shall not have resulted from his own neglect.

37. Should the assignee refuse or neglect to render his accounts as required by sections thirty-three and thirty-four of this act, or pay over a dividend when he shall have, in the opinion of the court, sufficient funds for that purpose, the court shall immediately discharge such assignee from his trust, and shall have power to appoint another in his place. The assignee so discharged shall forthwith deliver over to the assignee appointed by the court all the funds, property, books, vouchers, or securities belonging to the insolvent, without charging or retaining any commission or compensation for his personal services.

38. Preparatory to the final account and dividend, the assignee shall submit his account to the court, and file the same, and shall at the time of filing accompany the same with an affidavit that a notice by mail has been given to all creditors who have proved their claims, that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time specified in such notice, which time shall not be less than ten or more than twenty days from such filing. At the hearing the court shall audit the account, and any person interested may appear and file exceptions in writing and contest the same. The court thereupon shall settle the account, and order a dividend of any portion of the estate, remaining undistributed, and shall discharge the assignee, subject to compliance with the order of the court, from all liability as assignee to any creditor of the insolvent.

ARTICLE V.

Partnerships and Corporations.

39. Two or more persons who are partners in business, or the surviving partner of any firm, may be adjudged insolvent, either on the petition of such partners, or any one of them, or on the

petition of five or more creditors of the partnership, qualified as provided for in section nine of this act, in which case an order shall be issued in the manner provided by this act, upon which all the joint stock and property of the partnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as may be exempt by law; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the copartnership, and shall also keep separate accounts of the joint stock or property of the copartnership, and the separate estate of each member thereof, and after deducting out of the whole amount received by such assignee the whole amount of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock after the payment of the joint debts, such balance shall be divided and appropriated to and among the separate estate of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any insolvency; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts, and the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been by or against him alone under this act; and in all

other respects the proceedings as to the partners shall be conducted in the like manner as if they had been commenced and prosecuted by or against one person alone. If such copartners reside in different counties, the court in which the petition is first filed shall retain exclusive jurisdiction over the case. If the petition be filed by less than all the partners of a copartnership, those partners who do not join in the petition shall be ordered to show cause why they, as individuals, and said copartnership, should not be adjudged to be insolvent, in the same manner as other debtors are required to show cause upon a creditor's petition, as in this act provided; and no order of adjudication shall be made in said proceedings until after the hearing of said order to show cause; provided, that in case of proceedings by or against surviving partners, as such, only the partnership interest of deceased partners shall be subject to the control of the court in the insolvency proceeding; but the surviving partner, assignee, or creditors may pursue the property of the deceased partners in the court having jurisdiction thereof in probate proceedings.

40. The provisions of this act shall apply to corporations, and upon the petition of any officer of any corporation, duly authorized by the vote of the board of directors or trustees, at a meeting specially called for that purpose, or by the assent in writing of a majority of the directors or trustees as the case may be, or upon a creditor's petition made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. All the provisions of the act which apply to the debtor, or set forth his duties, examination, and liabilities, or prescribe penalties, or relate to fraudulent conveyances, payments and assignments, apply to each and every officer of any corporation

in relation to the same matters concerning the corporation. Whenever any corporation is declared insolvent, all its property and assets shall be distributed to the creditors; but no discharge shall be granted to any corporation.

ARTICLE VI.

Proof of Debts.

41. All debts due and payable from the debtor at the time of the adjudication of insolvency, and all debts then existing but not payable until a future time, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the debtor.

42. All demands against the debtor for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so withheld, from the time of the conversion; provided, however, that if the assignee, or any creditor whose claim has been proven against the estate, shall request it in writing, the court shall require the matter of such claim for damages to be tried as an ordinary action at law, to determine the liability of the debtor for such damages.

43. If the debtor shall be bound as indorser, surety, bail, or guarantor, upon any bill, bond, note, or other specialty or contract, or for any debt of any person, and his liability shall not have become absolute until the adjudication of insolvency, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared.

44. In all cases of contingent debts and contingent liabilities, contracted by the debtor, and not herein otherwise provided for, the creditor may make claim therefor and have his claim allowed, with the right to share in the dividends, if

the contingency shall happen before the order of the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall be done in such manner as the court shall order, and shall be allowed to prove for the amount so ascertained.

45. Any person liable as bail, surety, or guarantor, or otherwise, for the debtor, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor, if he shall have proved the same, although such payments shall have been made after the proceedings in insolvency were commenced; and any person so liable for the debtor, and who has not paid the whole of said debt, but is still liable for the same, or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same in the name of the creditor.

46. Where the debtor is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the insolvency, as if the same became due from day to day, and not at such fixed and stated periods.

47. In all cases of mutual debts and mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed and paid. But no set-off or counter-claim shall be allowed of a claim in its nature not provable against the estate; provided, that no set-off or counter-claim shall be allowed in favor of any debtor to the insolvent of a claim purchased by or transferred to him after the filing of the petition by or against him.

48. When a creditor has a mortgage, or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt owing

to him from the debtor, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the receiver, if any, and if no receiver, then upon such sum as the court, or a judge thereof, may decide to be fair and reasonable, before the election of an assignee, or by a sale thereof, to be made in such manner as the court, or judge thereof, shall direct; or the creditor may release or convey his claim to the receiver, if any, or if no receiver then to the sheriff, before the election of an assignee, or to the assignee if an assignee has been elected, upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the debtor's right of redemption thereon on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon, and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold or released, and delivered up, or its value fixed, the creditor shall not be allowed to prove any part of his debt.

49. No creditor, proving his debt or claim, shall be allowed to maintain any suit at law or in equity therefor, against the debtor, but shall be deemed to have waived all right of action and suit against him, and all proceedings already commenced, or unsatisfied, judgment already obtained thereon, shall be deemed to be discharged and surrendered thereby; and after the debtor's discharge, upon proper application and proof to the court having jurisdiction, all such proceedings shall be dismissed, and such unsatisfied judgments satisfied of record; provided, that no valid lien existing in good faith thereunder shall be thereby affected; and further provided, that a

creditor proving his debt or claim shall not be held to have waived his right of action or suit against the debtor where a discharge has been refused or the proceedings have been determined without a discharge. And no creditor whose debt is provable under this act shall be allowed, after the commencement of proceedings in insolvency, to prosecute to final judgment any action therefor against the debtor until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the debtor or of any creditor, or the assignee, be stayed to await the determination of the court in insolvency on the question of discharge; provided, that there be no unreasonable delay on the part of the debtor or the petitioning creditors, as the case may be, in prosecuting the case to its conclusion; and provided also, that if the amount due the creditor is in dispute, the suit, by leave of the court, in insolvency may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proven in insolvency, but execution shall be stayed as aforesaid; provided further, that where a valid lien or attachment has been acquired or secured in any such action, and an undertaking been offered and accepted in lieu of such lien or attachment, the case may be prosecuted to final judgment for the purpose of fixing the liability of the sureties upon such undertaking, but execution against the insolvent upon such judgment shall be stayed. [Amendment approved February 26, 1897; Stats. 1897, c. 38.]

50. Any person who shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given; nor shall he receive any dividend thereon until he shall first have surrendered to the assignee all property,

money, benefit, or advantage received by him under such preference.

51. The court may, upon the application of the assignee, or of any creditor of the debtor, or without any application, before or after adjudication in insolvency, examine upon oath the debtor in relation to his property and his estate and any person tendering or making proof of claims, and may subpoena witnesses to give evidence relating to such matters. All examinations of witnesses shall be had and depositions shall be taken in accordance with and in the same manner as is provided by the Code of Civil Procedure.

ARTICLE VII.

Discharge.

52. At any time after the expiration of three months from the adjudication of insolvency, but not later than one year from such adjudication, unless the property of the insolvent has not been converted into money, the debtor may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given to all creditors who have proved their debts, to appear, on a day appointed for that purpose, and show cause why a discharge should not be granted to the debtor; said notice shall be given by mail and by publication at least once a week, for four weeks, in a newspaper published in the county, or city and county, or, if there be none, in a newspaper published nearest such county, or city and county: provided, that if no debts have been proven, such notice shall not be required.

53. No discharge shall be granted, or if granted shall be valid, if the debtor shall have sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedngs in insolvency, in relation to any material fact concerning his estate, or his debts, or to any other material

fact; or if he has concealed any part of his estate or effects, or any books or writing relating thereto; or if he has been guilty of fraud or willful neglect in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act, or if he has caused or permitted any loss or destruction thereof; or if, within one month before the commencement of such proceedings, he has procured his lands, goods, moneys, or chattels to be attached, or seized on execution; or if he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made, or been privy to the making of, any false or fraudulent entry in any book of account or other document with intent to defraud his creditors; or if he has given any fraudulent preference, contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate; or, if, having knowledge that any person has proven such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or if, being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account; or if he, or any other person on his account, or in his behalf, has influenced the action of any creditor, at any stage of the proceedings, by any pecuniary consideration or obligation; or if he has, in contemplation of becoming insolvent, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is,

or may be, under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts; or if he has been convicted of any misdemeanor under this act, or has been guilty of fraud contrary to the true intent of this act; or, in case of voluntary insolvency, has received the benefits of this or any other act of insolvency or bankruptcy, within three years next preceding his application for discharge; or if insolvency proceedings in which he could have applied for a discharge are pending by or against him in the Superior Court of any other county, or city and county, in the State. And before any discharge is granted, the debtor shall take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in this act, as grounds for withholding such discharge or as invalidating such discharge, if granted.

54. Any creditor opposing the discharge of a debtor shall file specifications in writing, of the grounds of his opposition, and after the debtor has filed and served his answer thereto, which pleadings shall be verified, the court shall try the issue or issues raised, with or without a jury, according to the practice provided by law in civil actions.

55. If it shall appear to the court that the debtor has in all things conformed to his duty under this act, and that he is entitled under the provisions thereof to receive a discharge, the court shall grant him a discharge from all his debts, except as hereinafter provided, and shall give him a certificate thereof, under the seal of the court, in substance as follows: In the Superior Court of the county of ——, State of California. Whereas, —— has been duly adjudged an insolvent under the insolvent laws of this State, and appears to have conformed to all the require-

ments of law in that behalf, it is therefore ordered by the court that said —— be forever discharged from all debts and claims, which by said insolvent laws are made provable against his estate, and which existed on the —— day of ——, on which the petition of adjudication was filed by (or against) him, excepting such debts, if any, as are by said insolvent laws excepted from the operation of a discharge in insolvency. Given under my hand, and the seal of the court, this —— day of ——, A. D. ——. Attest: ——, Clerk. (Seal) ——, Judge.

56. No debt created by fraud or embezzlement of the debtor, or his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged under this act, but the debt may be proved, and the dividend thereon shall be a payment on account of said debt; and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt, for or with the debtor, either as partner, joint contractor, indorser, surety, or otherwise.

57. A discharge, duly granted under this act, shall, with the exceptions aforesaid, release the debtor from all claims, debts, liabilities, and demands, set forth in his schedule, or which were or might have been proved against his estate in insolvency, and may be pleaded by a simple averment that on the day of its date such discharge was granted to him, setting forth the same in full, and the same shall be a complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be prima facie evidence in favor of such fact and of the regularity of such discharge; provided, however, that any creditor of said debtor, whose debt was proved or provable against the estate in insolvency, who shall see fit to contest the validity of such discharge on the ground that it was fraudulently obtained, and who has discovered the facts

constituting the fraud subsequent to the discharge, may, at any time within two years after the date thereof, apply to the court which granted it to set it aside and annul the same, or if the same shall have been pleaded, the effect thereof may be avoided collaterally upon any such grounds.

58. The refusal of a discharge to the debtor shall not affect the administration and distribution of his estate under the provisions of this act.

ARTICLE VIII.

Fraudulent Preferences and Transfers.

59. If any debtor being insolvent, or in contemplation of insolvency, within one month before the filing of a petition by or against him, with a view to give a preference to any creditor, or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, mortgage, assignment, transfer, sale, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, to any one, the person receiving such payment, pledge, mortgage, assignment, transfer, sale, or conveyance, or to be benefited thereby, or by such attachment or seizure, having reasonable cause to believe that such debtor is insolvent, and that such attachment, seizure, payment, pledge, mortgage, conveyance, transfer, sale, or assignment is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way hinder, impede, or delay the operation of, or to evade any of the provisions of this act, such attachment, sequestration, seizure, payment, pledge, mortgage, transfer, sale, assignment, or conveyance, is void, and the assignee, or the re-

ceiver, may recover the property, or the value thereof, as assets of such insolvent debtor; and if such payment, pledge, mortgage, conveyance, sale, assignment, or transfer is not made in the usual and ordinary course of business of the debtor, or if such seizure or sequestration is made under a judgment which the debtor has confessed or offered to allow, that fact shall be prima facie evidence of fraud. All assignments, transfers, conveyances, mortgages, or encumbrances of real estate shall be deemed, under this section, to have been made at the time the instrument conveying or affecting such realty was filed for record in the county recorder's office of the county, or city and county, where the same is situated.

ARTICLE IX.

Penal Clauses.

60. From and after the taking effect of this act, if any debtor or insolvent shall, after the commencement of proceedings in insolvency, secrete or conceal any property belonging to his estate, or part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove, or cause to be removed, the same or any part thereof, with intent to prevent it from coming into the possession of the assignee in insolvency, or to hinder, impede, or delay his assignee in recovering or receiving the same, or make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate, with like intent, or shall spend any part thereof in gaming; or shall, with intent to defraud, willfully and fraudulently conceal from his assignee, or fraudulently or designedly omit from his schedule any property or effects whatsoever; or if, in case of any person having, to his knowledge or be-

lief, proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or shall attempt to account for any of his property by fictitious losses or expenses; or shall, within three months before commencement of proceedings of insolvency, under the false pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels, with intent to defraud; or shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in insolvency, pawn, pledge, or dispose of, otherwise than by bona fide transactions in the ordinary way of his trade, any of his goods and chattels which have been obtained on credit and remain unpaid for, he shall be deemed guilty of misdemeanor, and, upon conviction thereof, shall be punished by imprisonment in the county jail for not less than three months nor more than two years.

ARTICLE X.

Miscellaneous.

61. If any debtor shall die after the order of adjudication, the proceedings shall be continued and concluded in like manner and with like validity and effect as if he had lived.

62. Pending proceedings by or against any person, copartnership, or corporation, no statute of limitations of this State shall run against a claim which in its nature is provable against the estate of the debtor.

63. Any creditor, at any stage of the proceedings, may be represented by his attorney or duly authorized agent.

64. It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart, for the use and benefit of said insolvent,

such real and personal property as is by law exempt from execution; and also a homestead, in the manner provided in section one thousand four hundred and sixty-five of the Code of Civil Procedure. But no property or homestead shall be set apart, as aforesaid, until it is first proved that notice of the hearing of the application therefor has been duly given by the clerk, by causing to be posted in at least three public places in the county at least ten days prior to the time of such hearing, setting forth the name of said insolvent debtor, and the time and place appointed for the hearing of such application, which said notice shall briefly indicate the homestead sought to be exempted or the property sought to be set aside; and the decree must show that such proof was made to the satisfaction of the court, and shall be conclusive evidence of that fact.

65. The filing of a petition by or against a debtor upon which, or upon an amendment of which, an order of adjudication in insolvency may be made, shall be deemed to be the commencement of proceedings in insolvency under this act.

66. Words used in this act in the singular, include the plural, and in the plural, the singular, and the word "debtor" includes partnerships and corporations.

67. Upon the filing of either a voluntary or involuntary petition in insolvency, a receiver may be appointed by the court in which the proceeding is pending, or by a judge thereof, at any time before the election of an assignee, when it appears by the verified petition of a creditor that the assets of the insolvent, or a considerable portion thereof, have been pledged, mortgaged, transferred, assigned, conveyed, or seized, on legal process, in contravention or violation of the provisions of section fifty-nine of this act, and that it is necessary to commence an action to recover the same. The appointment, oath, undertaking and powers

of such receiver shall in all respects be regulated by the general laws of the state applicable to receivers. When an assignee is chosen, and has qualified, the receiver shall forthwith return to court an account of the assets and property which have come into his possession, and of his disbursements, and a report of all actions or proceedings commenced by him for the recovery of any property belonging to the estate, and the court shall thereupon summarily hear and settle the receiver's account, and shall allow him a just compensation for his services, including a reasonable attorney's fee, whereupon the receiver shall deliver all property, assets, or effects remaining in his hands, to the assignee, who shall be substituted for the receiver in all pending actions or proceedings.

68. All sections of the Code of Civil Procedure of the state of California relating to contempts are hereby made applicable to all proceedings under this act.

69. When an attachment has been made and is not dissolved before the commencement of proceedings in insolvency, or is dissolved by an undertaking given by the defendant, if the claim upon which the attachment suit was commenced is proved against the estate of the debtor, the plaintiff may prove the legal costs and disbursements of the suit, and of the keeping of the property, and the amount thereof shall be a preferred debt. In all contested matters in insolvency the court may, in its discretion, award costs to either party, to be paid by the other, or to either or both parties, to be paid out of the estate, as justice in equity may require; in awarding costs, the court may issue execution therefor. In all involuntary cases under this act, the court shall allow the petitioning creditors out of the estate of the debtor, if any adjudication of insolvency be made, as a preferred claim, all legal costs and disbursements incurred by them in that behalf.

70. The court may, upon the application of the debtor, if it be a voluntary petition, or of the petitioning creditors, if a creditor's petition, dismiss the petition and discontinue the proceedings at any time before the appointment of an assignee, upon giving ten days' notice to the creditors, in the same manner that notice of the time and place of an election of an assignee is given, if no creditor files written objections to such dismissal; provided, however, that by consent of all creditors the proceedings may be dismissed at any time. After the appointment of an assignee, no dismissal shall be made without the consent of all parties interested in or affected thereby.

71. An appeal may be taken to the Supreme Court in the following cases:

1. From an order granting or refusing an adjudication of insolvency;

2. From an order made at the hearing of any account of an assignee, allowing or rejecting a creditor's claim, in whole or in part;

3. From an order granting or overruling a motion for a new trial;

4. From an order settling an account of an assignee;

5. From an order against or in favor of setting apart homestead or other property claimed as exempt from execution;

6. From an order granting or refusing a discharge to the debtor.

The notice, undertaking, and procedure on appeal shall conform to the general laws of this state regulating appeals in civil cases, except that when an assignee has given an official undertaking and appeals from a judgment or order in insolvency, his official undertaking stands in the place of an undertaking on appeal, and the sureties therein are liable on such undertaking; provided, however, that an appeal from an order granting or refusing an adjudication of insolvency shall not stay proceedings unless a written undertaking be

entered into on the part of the appellant, with at least two sureties, in such an amount as the court, or a judge thereof, may direct, but not less than double the value of the property involved, to the effect that if the order appealed from be affirmed, or the appeal dismissed, appellant will pay all costs and damages which the adverse party may sustain by reason of the appeal and the stay of proceedings.

72. The Insolvent Act of eighteen hundred and eighty, and all amendments thereto, are hereby repealed; provided, however, that such repeal shall in no manner invalidate or affect any case in insolvency instituted and pending in any court on and prior to the day when this act shall take effect.

INTERPRETERS.

An Act to authorize the appointment of an Intepreter of the Italian language and dialects, in Criminal Proceedings, in cities, and cities and counties, of one hundred thousand inhabitants.

§ 1. Appointment of interpreter.
§ 2. Salary.
§ 3. Repeal.

Section 1. In all cities and cities and counties of over one hundred thousand inhabitants, where an interpreter of the Italian language is necessary, it shall be the duty of the mayor and police judge of such city, or city and county, and of the judge of the Superior Court of said city and county, or of the county in which said city is situated, or where there are more judges than one, then it shall be the duty of the presiding judge of said Superior Court, and the presiding judge of the police court and the mayor, to appoint an interpre-

ter of the Italian language, who must be able to interpret the Italian language and dialects into the English language, to be employed in criminal proceedings when necessary in said cities, or cities and counties. [Amendment approved March 9, 1895.]

Sec. 2. This act shall take effect immediately. [Stats. 1895.]

Sec. 2. The said interpreter shall receive a salary of one thousand five hundred dollars per annum, which shall be paid out of the general fund of such city, or city and county.

Sec. 3. This act shall not repeal any act heretofore made and now in force for the appointment of interpreters, except so much of any act which may conflict with this act in the appointment of Italian interpreters.

Sec. 4. This act shall take effect and be in force from and after its passage. [Approved March 12, 1885; 1885, 108.]

JUSTICES OF THE PEACE.

An Act fixing Jurisdiction and providing Compensation for Justices of the Peace in cities and towns.

§ 1. Powers of justice of the peace.
§ 2. Compensation.

Powers of justices of the peace.

Section 1. Justices of the peace in any township composed in whole or in part of an incorporated city or town, and justices of the peace in any city or town, in addition to the jurisdiction and powers now conferred upon them, are authorized and empowered to exercise all powers, duties, and jurisdiction, civil and criminal, of police judges, judges of police courts, recorders' courts, or mayors' courts within such cities.

Compensation.

Sec. 2. The compensation of the justice of the peace of any city or town, who is paid by salary, shall be by warrants for equal monthly payments, drawn each month upon the salary fund of such city or town if there be one; or if no salary fund be provided, then upon the general fund of such city or town, such warrants to be audited and paid as are salaries of other city officials.

Sec. 3. This act shall take effect immediately. [Approved March 9, 1883; 1883, 63.]

An Act concerning the Justices' Courts of the City and County of San Francisco, and the service of Summons issued therefrom.

Summons.

Section 1. The summons issued from the justices' courts may be served and returned as provided in Title V., Part II., of the Code of Civil Procedure.

Sec. 2. This act shall take effect from and after its passage. [Approved April 3, 1876; 1875-6, 855.]

An Act to create a Court in and for the Town of Berkeley, State of California.

§ 1. Justice court in Berkeley.
§ 2. Two justices.
§ 3. Jurisdiction.
§ 4. Rules of practice.
§ 5. Fees.
§ 6. Fines.
§ 7. Compensation.
§ 8. Disqualification.

Section 1. There is hereby created and established in and for the town of Berkeley, State of California, a court, to be known as the justice's

court of the town of Berkeley, which court shall consist of two justices of the peace, and the judicial power of the town shall be vested in said justice's court and such other courts as may be provided by law.

Sec. 2. Two justices of the peace shall be elected at the time that other justices are elected, whose terms of office shall be two years; provided, that the two justices elected for the town of Berkeley at the general election held November sixth, eighteen hundred and ninety-four, shall hold office as justices of the town of Berkeley until the first Monday in January, eighteen hundred and ninety-seven. The justices' courts shall always be open, legal holidays excepted.

Sec. 3. The justice's court and the justice thereof, shall have jurisdiction concurrently with other justices' courts of all actions and proceedings, civil and criminal, arising within the corporate limits of the town, and which might be tried in a justice's court; provided, however, that within the corporate limits of the town, the town justices of the peace and the town justices' courts shall have exclusive jurisdiction and power over all actions for the recovery of any fine, penalty, or forfeiture prescribed for the breach of any ordinance of the town, of all actions founded upon any obligations or liability created by any ordinance, and of all prosecutions for any violation of any ordinance; provided, moreover, that the board of trustees may, by ordinance, select both or either of said justices to have jurisdiction of all criminal prosecutions arising under ordinance.

Sec. 4. The rules of practice and mode of proceeding shall be the same as are or may hereafter be prescribed for justices' courts.

Sec. 5. The justices of the peace shall be entitled to charge and receive for their services such fees as are or may be allowed by law to justices of the peace for like services, and to collect said

fees in the same manner as other justices' fees are collected, excepting that for their services in criminal prosecution for violation of ordinances they shall be entitled to receive only such fees or salary as the board of trustees may by ordinance prescribe, which compensation, when once fixed, shall not be altered within two years thereafter.

Sec. 6. Each justice of the peace shall pay to the treasurer of said town, on the first Monday of each month, all fines by him collected for violation of ordinances, and file a full monthly report with the town clerk, showing the amount of all fees collected, from whom, and in what case such fines and fees were collected and paid.

Sec. 7. The board of trustees may, at their option, by ordinance, fix a monthly compensation for such justices, which said compensation shall be in full for all services rendered as justices; provided, that when such monthly compensation is so fixed all fees and fines, other than those required by law to be paid to the county, shall be paid to the town treasurer.

Sec. 8. In all cases where for any reason either of the justices is disqualified, or in any case of sickness or inability to act, he may call in the other justices, and if both are disqualified or unable to act, any justice of the peace residing in the county.

Sec. 9. This act shall take effect immediately after its passage. [Approved March 27, 1895; Stats. 1895, p. 204.]

An Act in relation to Jurors in Courts of Justices of the Peace in the County of Humboldt.

Cause of challenge in justice's court in Humboldt county.

Sec. 1. In the trial of any civil action in the court of a justice of the peace, in the county of

Humboldt, it shall be a good cause of challenge to any individual juror that he has served as a trial juror in a civil action in said court, in the same township, twice at any time within one year next preceding.

Sec. 2. Jurors in said courts shall receive, as compensation for their services, the sum of two dollars per day. [Approved March 3, 1874; 1873-4, 229.]

An Act relative to Executions from Courts of Justices of the Peace of the several Townships of the County of Alameda.

This act, which required executions from justices' courts to be served by the sheriff or a constable of the township in which the court issuing it was held, was repealed by act of April 1, 1880, 19 (Ban. ed. 62). Took effect from passage. [Approved February 25, 1878; 1877-8, 106.]

LIBEL.

An Act concerning Actions for Libel and Slander.

§ 1. Undertaking.
§ 2. Sureties.
§ 3. Exception to sureties.
§ 4. Justification.
§ 5. Approval—new mortgage.
§ 6. Failure to file bond.
§ 7. Costs.

Section 1. In an action for libel or slander the clerk shall, before issuing the summons therein, require a written undertaking on the part of the plaintiff in the sum of five hundred (500 dollars, with at least two competent and sufficient sureties, specifying their occupations and residences, to the

effect that if the action be dismissed or the defendant recover judgment, that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, or on an appeal, not exceeding the sum specified in the undertaking. An action brought without filing the undertaking required shall be dismissed.

Sec. 2. Each of the sureties on the undertaking mentioned in the first section shall annex to the same an affidavit that he is a resident and householder or freeholder within the county, and is worth double the amount specified in the undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

Sec. 3. Within ten days after the service of the summons the defendants, or either of them, may give to the plaintiff or his attorney notice that they or he except to the sureties and require their justification before a judge of the court at a specified time and place, the time to be not less than five nor more than ten days thereafter, except by consent of parties. The qualifications of the sureties shall be as required in their affidavits. [In effect April 16, 1880.]

Sec. 4. For the purpose of justification, each of the sureties shall attend before the judge at the time and place mentioned in the notice, and may be examined on oath touching his sufficiency in such manner as the judge in his discretion shall think proper. The examination shall be reduced to writing if either party desires it.

Sec. 5. If the judge find the undertaking sufficient, he shall annex the examination to the undertaking, and indorse his approval thereon. If the sureties fail to appear, or the judge finds the sureties or either of them insufficient, he shall order a new undertaking to be given. The judge may also at any time order a new or additional

undertaking upon proof that the sureties have become insufficient. In case a new or additional undertaking is ordered, all proceedings in the case shall be stayed until such undertaking is executed and filed, with the approval of the judge.

Sec. 6. If the undertaking as required be not filed in five days after the order therefor, the judge or court shall order the action to be dismissed.

Sec. 7. In case plaintiff recovers judgment, he shall be allowed as costs one hundred (100) dollars, to cover counsel fees, in addition to the other costs. In case the action is dismissed, or the defendant recover judgment, he shall be allowed one hundred (100) dollars, to cover counsel fees, in addition to the other costs, and judgment therefor shall be entered accordingly. [Approved March 23, 1872; Stat. 1871-2, p. 533.]

MORTGAGES.

An Act to abolish Attorney's Fees and other charges in Foreclosure Suits.

Attorney's fee on foreclosure to be fixed by court.

Section 1. In all cases of foreclosure of mortgage the attorney's fee shall be fixed by the court in which the proceedings of foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding.

Sec. 2. All acts and parts of acts, so far as they conflict with the provisions of this act, are hereby repealed, and this act shall take effect and be in force from and after its passage. [Approved March 27, 1874; 1873-4, 707.]

PROCESS.

An Act concerning the Execution of Final Process in certain cases.

Service of final process in new counties.

Section 1. In all cases where new counties have been or may hereafter be erected, and executions, orders of sale upon foreclosures of mortgages, or other process affecting specific real estate, have been or may hereafter be adjudged by the final judgment or decree of a court of competent jurisdiction, to be executed by the sheriff of the county in which such real estate was originally situated, such process may be executed by the sheriff of the new county in which such real estate is found to be situated, with the like effect as if he were the sheriff of the county designated in the judgment, decree, or order of sale, to execute the same.

Sec. 2. This act shall take effect and be in force from and after its passage. [Approved March 16, 1874; 1873-4, 365.]

An Act to declare valid Writs, Process, and Certificates issued by the Superior Courts of this State, or the Clerks thereof, before such Courts shall have been legally provided with Seals.

Writs, process, etc., declared valid.

Section 1. No writ, process, or certificate issued by any Superior Court, or the clerk thereof, before such court shall have been legally provided with a seal, shall be invalid, if in other respects valid, by reason of the absence of a lawful seal; but every such writ, process, or certificate,

whether under the seal of one of the courts abolished on the first day of January, eighteen hundred and eighty or under the private seal of the clerk, or under any other seal, or issued without a seal, shall have the same validity as if it had been authenticated by a legally adopted seal of the court out of which or by whose clerk it was issued.

Sec. 2. This act shall take effect immediately. [Approved March 31, 1880; 1880, 19 (Ban. ed. 62.)]

RECORDS.

An Act to transfer the Records, Papers, and Business of the Courts existing on the thirty-first day of December, eighteen hundred and seventy-nine, in this State, to the Courts now existing therein.

§ 1. Supreme Court, successor of court of same name.
§ 2. Superior Courts, successor of what courts.
§ 3. Police court of San Francisco, transfer of cases to.

Supreme court, successor of court of same name.

Section 1. The Supreme Court shall, for all purposes, be considered the successor of the court of the same name which was abolished on the first day of January, eighteen hundred and eighty, and to have succeeded to all its unfinished business. It shall have jurisdiction of, and shall hear and determine, or otherwise dispose of, all causes, proceedings, appeals, motions, and matters pending on said day in the court superseded by it; and also, of all appeals taken to such court before or after such day, from judgments or orders of any of the inferior courts abolished by the constitution.

From and after the first day of January, eighteen hundred and eighty, the Supreme Court shall have the custody of all records, books, and papers of the former Supreme Court, and the same jurisdiction over its judgments, orders, and proceedings as if they had in the first instance been rendered, made, or commenced in the present court. All laws relating to the former court shall, as far as applicable, be considered as applying to the present court. All rules of the former court which were in force on the first day of January, eighteen hundred and eighty, and not inconsistent with the constitution, shall continue in force as rules of the present court until altered, abolished, or superseded by the order of the court.

Superior courts, successor of what courts.

Sec. 2. The Superior Court of each county in this state shall, for all purposes, be considered the successor of the district, county, and probate courts thereof, and, in the city and county of San Francisco, of the municipal criminal court and municipal court of appeals, and shall be deemed to have succeeded to all the unfinished business of said courts. The Superior Courts shall hear, determine, or otherwise dispose of, all causes and proceedings which were pending on the first day of January, eighteen hundred and eighty, in the said courts superseded by them, and every motion or proceeding then pending or thereafter made or taken in such causes and proceedings, and of which said courts would have had jurisdiction had they not been abolished; and also, all appeals taken or perfected, before or after said day, from all orders or judgments of justices' and police courts which by law are declared to be appealable. From and after the first day of January, eighteen hundred and eighty, the Superior Courts shall have the custody of all the records, books, and papers of the said courts superseded by them,

and shall have jurisdiction thereof, and of the judgments, orders and process of said courts; and shall enforce the same and issue process thereon in like manner, and with the same effect, as if they had in the first instance been filed, commenced, rendered, made, or issued in or by the Superior Court. The Superior Court of the city and county of San Francisco shall have jurisdiction of, and shall try and dispose of, all indictments for misdemeanor pending in the city criminal court of said city and county on the first day of January, eighteen hundred and eighty; and such indictments and all papers and records relating thereto, shall be transferred to the said Superior Court and become records thereof. Any application, motion, or proceeding, set by the district, county, or probate court of any county, or by the judge thereof, to be heard by such court or judge after the first day of January, eighteen hundred and eighty, may be heard in the Superior Court of such county, upon the same notice that was required to authorize the hearing thereof in such district, county, or probate court, or by the judge thereof. Any process issued out of any district, county, or probate court of this state before the first day of January, eighteen hundred and eighty, may be served, or the service thereof completed, after said day, in the same manner and with like effect, as if such courts had not been abolished; provided, that such process shall be returned to the Superior Court of the county in which it was issued, and any appearance or answer required by such process shall be made or filed in such court.

Police court of San Francisco, transfer of cases to.

Sec. 3. All prosecutions which were transferred or certified for trial to the city criminal court of the city and county of San Francisco, by the police court thereof, and were pending or undeter-

mined on the first day of January, eighteen hundred and eighty, shall be tried and disposed of in the said police court; and all the papers, pleadings, and records relating to such prosecutions shall be transferred to, and deposited with, said police court, and become records and papers thereof.

Sec. 4. This act shall take effect immediately. [Approved February 4, 1880; 1880, 2 (Ban. ed. 2).]

STATE.

An Act to authorize Suits against the State, and regulating the Procedure therein.

§ 1. Right of action.
§ 2. Limitation of actions.
§ 3. Undertaking.
§ 4. Service of summons.
§ 5. Judgment.
§ 6. Duty of Governor.
§ 7. Duty of Controller.

Section 1. All persons who have, or shall hereafter have, claims on contract or for negligence against the State not allowed by the State board of examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the State in any of the courts of this State of competent jurisdiction, and prosecute the same to final judgment. The rules of practice in civil cases shall apply to such suits, except as herein otherwise provided.

Sec. 2. No such suit shall be maintained on any claim now existing, unless the same be brought within two years after this act takes effect; nor shall any such suit be maintained on any cause of action hereafter arising, unless the same shall be commenced within two years after such cause of action shall have accrued; provided, that the period of limitation pro-

vided for in section two of this act shall not apply to or affect the rights, interest, or claims of any minor or insane person, or a person imprisoned on a criminal charge, or in execution under a sentence of a criminal court for a period of not less than for life, or a married woman and her husband be a necessary party with her in commencing such action, or an incompetent person, but such action may be commenced within the period above provided for after such disability shall cease.

Sec. 3. At the time of filing the complaint in any such suit, the plaintiff shall file therewith an undertaking, in such sum, not less than five hundred dollars, as a judge of the court shall fix, with two sufficient sureties, to be approved by a judge of the court, and conditioned that, in case the plaintiff fails to recover judgment, he will pay all costs incurred by the State in such suit, including a reasonable counsel fee, to be fixed by the court.

Sec. 4. Service of summons in such suits shall be made on the governor and attorney general. It shall be the duty of the attorney general to defend all such suits; and upon his written demand, made at or before the time of answering, the place of trial of any such suit must be changed to the county of Sacramento.

Sec. 5. In case judgment be rendered for the plaintiff in any such suit, it shall be for the amount actually due from the State to the plaintiff, with legal interest thereon, from the time the obligation accrued, and without costs.

Sec. 6. It shall be the duty of the governor to report to the legislature, at each session, all judgments rendered against the State, and not theretofore reported.

Sec. 7. It shall be the duty of the controller to draw his warrant for the payment of any such judgment, without any presentation to or approval

of such claim by the State board of examiners, whenever a sufficient appropriation for such payment shall have been made by the legislature; and all claims upon such judgments are hereby expressly exempted from the operation of section six hundred and seventy-two of the Political Code.

Sec. 8. This act shall take effect immediately. [Approved February 28, 1893; Stats. 1893, p. 57.]

An Act to authorize Robert C. Ball to sue the State of California.

Section 1. Robert C. Ball is hereby authorized to commence and prosecute a civil action in any court of competent jurisdiction, against the State of California, for the value of his services as architect and superintendent of the branch State prison at Folsom.

Sec. 2. Summons in said action shall be served by delivering a copy thereof, attached to a copy of the complaint, to the attorney general of the State, and it shall be the duty of the attorney general to defend said action.

Sec. 3. In beginning this action it is expressly understood that said Robert C. Ball shall file with the court, where such is first to be tried, a bond in sufficient sum to cover the cost of court, such as may be deemed sufficient, and approved by said court, and an additional bond in the sum of five hundred dollars, to be paid as fees for counsel employed by the State in the defense of the case; but in the event the judgment is in favor of Robert C. Ball, he shall in no manner be responsible, and his bondsmen shall be released from all liability.

Sec. 4. Either party to said action may appeal to the Supreme Court from any judgment or appealable order of said Superior Court therein.

Sec. 5. If final judgment shall be rendered against the State, it shall be the duty of the controller of the State, upon presentation of a certified copy of said judgment, to draw his warrant in favor of said Robert C. Ball for the amount of said judgment.

Sec. 6. And it shall be the duty of the treasurer to pay the sum out of any moneys not otherwise appropriated.

Sec. 7. This act shall take effect from and after its passage. [Approved March 24, 1891; Stats. 1891, p. 194.]

An Act to enable the Coulterville and Yosemite Turnpike Company, a corporation, to sue the State of California for the loss and damage suffered and sustained by said corporation by the construction of a road by the Yosemite Turnpike Road Company, under and by virtue of an act of the Legislature of the State of California, entitled, "An Act granting the right of way to the Yosemite Turnpike Road Company over the Yosemite Grant," approved February 17, 1874, and for the relief of said Coulterville and Yosemite Turnpike Company.

§ 1, 2, 3. Preamble.
§ 4. Authorized to sue State.
§ 5. Bond for costs and attorney fees.
§ 6. Appeal—duty of Governor.

Section 1. Whereas, the commissioners to manage the Yosemite Valley and the Mariposa Big Tree Grove, by their resolution adopted the sixteenth day of July, eighteen hundred and seventy-two, together with a written agreement dated the thirteenth day of August, eighteen hundred and seventy-two, agreed with the Coulterville and Yosemite Turnpike Company, a corporation, that said

Coulterville and Yosemite Turnpike Company should have the exclusive right to construct and maintain a wagon road on the northerly or Coulterville side of the Merced river, from a point at or near Crane Flat, past the line of survey of that reservation from the public lands of the United States, known as the Yosemite Grant, to and upon the level of the Yosemite Valley, and should have the exclusive right to maintain a road on said side of the Merced River, and collect tolls thereon for a term of ten years from the completion thereof; and the said road, in pursuance of such resolution and agreement, was completed on the eighteenth day of June, eighteen hundred and seventy-four, and said commissioners, on the third day of July, eighteen hundred and seventy-four, accepted the same as completed.

Sec. 2. And whereas, in the year eighteen hundred and seventy-four the legislature of the State of California passed an act entitled "An act granting the right of way to the Yosemite Turnpike Road Company to construct a toll road over the Yosemite Grant," approved February seventeenth, eighteen hundred and seventy-four and under and by virtue of said act said Yosemite Turnpike Road Company constructed and completed a road on the northerly side of the Merced river, from near Gentry's Station, to a point on the level of the Yosemite Valley, near El Capitan, which said road was completed in the month of July, eighteen hundred and seventy-four.

Sec. 3. And whereas, the last mentioned road was on the northerly, or Coulterville, side of the Merced river, and conflicted with the exclusive privilege so granted to said Coulterville and Yosemite Turnpike Company, and by reason of the construction and completion of the same the wagon road completed by said Coulterville and Yosemite Turnpike Company then became little used

and said Coulterville and Yosemite Turnpike Company claims to have suffered great loss and damage, by reason of the loss of tolls on its said road, and the depreciation in value of said road.

Sec. 4. The said Coulterville and Yosemite Turnpike Company is hereby authorized to commence and prosecute a civil action, in the superior court of the county of Sacramento, against the State of California, to recover such amount, if any, as it may in law or equity be entitled to receive as compensation for the injuries aforesaid. Summons in said action shall be issued, and together with a copy of the complaint served upon the Attorney General of the State, and it shall be his duty to defend said action, and to interpose thereto such defenses, legal or equitable, as may exist, and which a private person under like circumstances might interpose. In beginning this action, it is expressly understood that said Coulterville and Yosemite Turnpike Company shall file with the superior court of the county of Sacramento a bond in sufficient sum to cover the costs of court, such as may be deemed sufficient and approved by said court, and an additional bond in the sum of five hundred dollars, to be paid as fees for counsel employed by the State in the defense of the case; but in the event the judgment is in favor of said Coulterville and Yosemite Turnpike Company, it shall in no manner be responsible, and its bondsmen shall be released from all liability.

Sec. 5. If, in said action, a judgment shall be entered in favor of the plaintiff therein, it shall be the duty of the Attorney General to take an appeal therefrom to the supreme court of the State, and if such judgment shall be finally affirmed by said supreme court, then the plaintiff in said action shall file a certified copy of said judgment with the Governor of the State; and it is hereby

made the duty of the Governor, by message, to inform the next legislature of the existence of said judgment against the State.

Sec. 6. This act shall take effect from and after its passage. [Approved March 31, 1891; Stats. 1891, p. 275.]

STATUTE OF LIMITATIONS.

An Act respecting the Limitations of Actions.

Bankers' certificates of deposit.

Section 1. Where bankers' certificates of deposit have heretofore been given to any party since deceased, and not found until after administration of his or her estate, an action may be maintained thereon by the heirs or legal representatives at any time within six months after such finding.

Sec. 2. This act shall take effect from and after its passage. [Approved March 11, 1872; 1871-2, 319.]

An Act supplementary to an Act entitled an Act defining the Time for commencing Civil Actions, passed April twenty-second, eighteen hundred and fifty.

No limitation to action for money deposited with bankers.

Section 1. There shall be no limitation upon the right to maintain an action for the recovery of money or other property deposited with any bank, banker, trust company, or savings and loan society.

Sec. 2. All acts and parts of acts in conflict herewith, so far as the same are in conflict, are hereby repealed.

Sec. 3. This act shall take effect from and after its passage. [Approved March 16, 1872; 1871-2, 401.]

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